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**“Eisenhower’s Warning Realized: The Issues with the U.S. Reliance on Contractors
in the Battlespace ”**

by

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A paper submitted to the Faculty of the Joint Advanced Warfighting School in partial satisfaction of the requirements of a Master of Science Degree in Joint Campaign Planning and Strategy.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Joint Forces Staff College or the Department of Defense.

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ABSTRACT

The United States has relied upon contractors in every battle. Yet the reliance has risen steadily since the 1990s. The numbers have risen from a 1 to 65 troop to contractor ratio in Desert Storm to 1 to 1 in Iraqi and Afghanistan operations. Reasons vary for the use. The end of the Cold War is often cited as the main driver. Other drivers include the increased use of outsourcing. In doing so, the long-term responsibilities—retirement, healthcare, etc.—are carried by the contractor and not the USG. But are these just outsourced services or mercenaries?

Mercenary definitions are given by several standing government entities such as the United Nations. Examination of those definitions against the current contractors renders a large gray area. In order to resolve this one must dig deeply into several areas including the United States Labor Bureau descriptors. This is vital to establish proper oversight in the legal realm.

Legal aspects are currently being discussed in great detail. Much of it centers on the media coverage of Blackwater's presence in Iraq. Many laws exist now to prosecute those issues that have arisen, as well as those associated with Abu Ghraib. But none have been used against contractors as of this writing. Additionally, to maintain order, oversight of contractors is needed. As the United States turned to contractors to replace troops, acquisitions personnel were reduced dramatically.

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INTRODUCTION

Akin to, and largely responsible for the sweeping changes in our industrial-military posture, has been the technological revolution during recent decades.

In this revolution, research has become central, it also becomes more formalized, complex, and costly. A steadily increasing share is conducted for, by, or at the direction of, the Federal government.

Today, the solitary inventor, tinkering in his shop, has been overshadowed by task forces of scientists in laboratories and testing fields. In the same fashion, the free university, historically the fountainhead of free ideas and scientific discovery, has experienced a revolution in the conduct of research. Partly because of the huge costs involved, a government contract becomes virtually a substitute for intellectual curiosity. For every old blackboard there are now hundreds of new electronic computers.¹

These words seem as though they were taken from the newspapers or blogs of today. In reality, they are the words of Dwight D. Eisenhower, spoken on January 17, 1961. They are the origination of the “military-industrial complex” aphorism, in which then President Eisenhower reflected on the industrial base conversion from a consumer platform to a military supply juggernaut.

Thirty years later another politician made another now-famous quotation on his rise to the same office: “It’s the economy stupid,” the political motto, created by strategist James Carville for then Arkansas governor William (Bill) Clinton’s campaign. His opponent, George H. W. Bush had much success in the foreign policy realm—overseeing the fall of the Berlin Wall and successfully repelling Saddam Hussein’s forces out of Kuwait—yet his domestic agenda had stalled. On the campaign trail, Governor Clinton emphasized the economy, asking Americans to compare their current fiscal status

¹ Eisenhower, Dwight D., Eisenhower Archives website, http://www.eisenhower.archives.gov/speeches/farewell_address.html (accessed August 17, 2007).

to that at the beginning of the Bush presidency. The events during both men's presidency led to the realization of Eisenhower's warning: the fall of the Berlin Wall and globalization. The first created a glut of military personnel who had fought a 40-plus year campaign known as the Cold War. The second, a globalized economy led to an increase in outsourcing.

The result is the rebirth of a military that has existed for centuries. This armed force is either at the beck and call of the state by augmenting the state's force, or is for private use and therefore completely independent of state affairs. This military force is often referred to as mercenaries. The current form possesses the capabilities of the USN SEALS and Wall Street business savvy. These companies have several monikers, Private Military Companies (PMC), Private Security Companies (PSC), and Private Security Firms (PSF). Many firms perform more than one type of service. The rationale given for utilizing their service(s) is the same as Toyota's hiring Denso Corporation to build instrumentation. It allows the hiring organization to focus on its core competencies, become more efficient in delivering goods to the customer, allowing them to save money, which results in lower costs to all. But a supply-chain organization of car manufacturing is starkly different from that which puts combat power on an enemy's location. The motivation of all individuals involved is different, the purpose is different and the hazards of having a piece of the supply chain faltering are different. If Toyota's shipment from Denso is delayed, then the production line is halted and worse case, Toyota loses money and people lose their jobs. If the support functions of a PMC are late, casualties may occur, and ultimately, the security of the nation lies at risk.

The thesis of this paper is the United States is utilizing Private Military Companies (PMCs) more often in order to increase cost savings and efficiency; yet PMCs are wrought with questionable legal practices, and fail to deliver savings and efficiency, which means that PMCs reduce U.S. strategic capabilities.

This paper is based on the premise that the reader has little to no background in the subject matter. It is assumed opinions have been formed based upon the media's portrayal of Blackwater's alleged actions in Iraq, but those opinions should be reevaluated, as the author's were. In investigating PMCs within the context of US security, this paper will examine their origins against the milieu of mercenary roots, examining how mercenaries were utilized in the past, and examine how they have evolved into PMCs and if the two are the same. In order to do this one must define a PMC, even as people who have spent years examining this topic cannot come to a conclusion in definition. Additionally, an exploration into the factors that lead to the explosion of PMC availability, including the Cold War, budgets, and globalization. Legal implications are enormous and also vague. The reader will learn that legal issues are either not available or are not being fully enforced to a point that legal precedents can be established. All of these issues undermine the strategic implications of the USG involvement in world affairs.

One key point to remember is that PMCs are a business. Businesses work to make profits and as large as possible. This is done through efficiencies and cost savings. The military is not a business per se. It is an extension of government policy. Its focus is more on effectiveness. While the military must take cost into consideration, wartime

plans rarely concern itself with cost first. The primary focus is to, in the words of Carl von Clausewitz, “to disarm the enemy”.²

² von Clausewitz, Carl, *On War*, edited by Michael Howard and Peter Paret, New York: Alfred A. Knopf Random House, 1993

CHAPTER ONE—HISTORY³

Being mercenaries is often described as the second or third⁴ oldest profession. Since the first wars, men have found others who would fight in their place. These fighters were typically foreigners hired as individuals or as entire entities or companies. Regardless of their structure and origins, the drive was the same: profit. This chapter will examine the history of mercenaries in order to lay the framework for the evolution of warfare for profit. In doing so, one must look at warfare not in the manner of fighting, but at the motives that brought about the use and prosperity of mercenaries. Additionally, the mercenary structure has evolved by mirroring the business society in which it exists. Not until Napoleon's army did mercenaries receive a negative connotation. In fact during societal evolvements, “(p)rivate military organizations particularly thrived in period of systemic transition. Governments were weakened...”⁵ and often incapable to maintain ownership of force. Troops were no longer under obligation to the state. Therefore, they freely sought employment on the open market.

As stated earlier, it is nothing new that a hired hand has taken up arms for a price. In some sense, they were the professionals of their day. The existence of mercenaries can

³ Much of the information in the ‘History’ chapter is derived from Singer’s book *Corporate Warriors*, specifically Chapter Two, “Privatized Military History”. Mr. Singer utilizes many sources to gain insight in the history of PMCs. This author believed that the limitations of the paper did not allow such an extensive review of history, therefore, the highlights from Mr. Singer’s work was the foundation of the chapter. This “History” chapter is not to be an extensive review of the rise of the examined topic, but a general overview to give the reader a point of origin and parallel insight in the current environment. If the reader desires an in depth analysis of the topic, Mr. Singer’s chapter is a wonderful starting point.

⁴ Geneva Centre for the Democratic Control of Armed Forces (DCAF) no. 6, *Privatising Security: Law, Practice, and Governance of Private Military and Security Companies*, Prepared by Fred Schreier and Marina Caparini, (Geneva: March 2005)

⁵ Singer, P.W., *Corporate Warriors: The Rise of the Privatized Military Industry*. (Ithaca, NY: Cornell University Press, 2003), 20.

be found in recorded history as far back as Biblical times. The great Egyptian Pharaoh Ramses II employed Numidians to battle the Hittites.⁶ David utilized the Philistines' army to defeat Saul. The engagement of war became the art of war as societies evolved. Specific civilizations honed certain war fighting skills, some, including the Phoenicians, specialized in naval tactics, while others honed skills more general in nature. Mercenary use became so prevalent in history that an entire war was named for the event. The Mercenary War (240 B.C.) was the result of the Carthaginians exclusive use of mercenaries to confront the Romans. After being defeated by the Romans in the First Punic War, the unpaid mercenaries revolted. The Carthaginians managed to repel the unit but only by hiring more mercenaries.

Mercenaries use continued to grow as civilizations but became less stable. As cultures expanded their influence, whether economic or territorial, they became more protective of their property. In taking this stance, individuals did not want to forsake their economic positions to participate in the distractions of war. Additionally, those in positions of power wanted to maintain their standing and were threatened by “an armed populace.”⁷ As societies, empires, and kingdoms grew, people’s skills became more specialized in their respective fields. This trend continued to evolve in all aspects of society so that, “(b)y the end of the fourteenth century, privately organized units had largely taken over the field of battle from their feudal predecessors. The way to form an army now consisted of ‘commissioning’ [the term still used today to denote the rise to an

⁶ Singer, *Corporate Warriors*, 20.

⁷ Singer, *Corporate Warriors*, 22.

officer rank] a private individual to raise troops, clothe them, equip them, train them, and lead them.”⁸

Since there were those who specialized in waging war, the elites could hire—outsource—the fighting. The European continent, an area of constant instability, employed large mercenary forces. The combination led to extensive use of mercenaries throughout the area. The Hundred Years War saw the creation of companies that were formed by soldiers who had originally been hired in singular fashion. As the war drew down—a lack of funds led to reduced hostilities—the individuals found themselves unemployed. They then started assembling into their own companies. This granted easier access to employment and the necessary opportunities to survive. These entities, called Free Companies, would search for work but at times may have created some for them. Free companies began to break down the feudal structures and implement “...permanent military and economic organizations that were systematically in the pay of one or more localities.”⁹

The companies took their business endeavors as seriously as their military ones. Some of their approaches would rival the branding capabilities on Madison Avenue today. Their goal: to strike fear into the hearts of many. These tactics would cause cities to employ their services to keep possible enemies at bay. But problems arose whenever conflict actually occurred. Their approach was to focus on the prisoners rather than the body count. At that time, prisoners were ransomed handsomely. This is not to say that battles did not occur. Whenever a battle ensued, the maneuver and skill displayed by the mercenaries demonstrated incredible precision for the time.

⁸ Singer, *Corporate Warriors*, 22.

⁹ Singer, *Corporate Warriors*, 23.

The companies were quite transitory in nature. They fought in their homelands, but would travel to other countries as well. A striking example of this occurred in the late 14th century as many mercenaries moved into the provinces of Italy, where people were quite wealthy but also in deep conflict.¹⁰ Individuals' of wealth tried to preserve their interests. Since their wealth was liquid, it was easier for them to hire the companies than it was for those in western European areas whose wealth was staked in land holdings. But not all were fond of mercenaries.

The French merchant class grew tired of mercenaries' harassments. French King Charles VII taxed the "bourgeois class" in order to raise an army at the request of the merchant class. The army consisted of several companies who were utilized to disband and destroy the remaining companies. Enough funds were raised so that the companies hired could be left in the employment of the state becoming the first French standing army.¹¹

The use of mercenaries throughout Europe remained commonplace for centuries, but the advent of the nation-states, created in the Peace of Westphalia Treaty of 1648, signaled the weakening of mercenary use. Yet their use continued to be prevalent throughout the next century until the arrival of Napoleon. As the state became more powerful it was able to raise and maintain its own army. Nevertheless, the power did not diminish the use of mercenaries. The British Empire found that its obligations throughout its kingdom made it impossible to diminish the uprising of the colonies in the New World. The British sought help from alliances, specifically from Russians, who

¹⁰ Singer, *Corporate Warriors*, 26.

¹¹ Singer, *Corporate Warriors*, 26.

refused to provide troops necessary to curtail the revolt.¹² Britain turned to the free market system to fill its needs. Their answer was found in the Hessians, a group of Germans who worked for a firm called Hesse-Kassel, which provided the majority of troops to Britain. Those in the colonies did not respond well to this news. In fact, the Hessians' actions unified the colonist to come to arms against the British. [The Americans were not pure in their army. The U.S. congress hired Baron Von Steuben to train the colonist troops at Valley Forge. Historians often credit his insight for the British defeat in that war.¹³] The colonists defeated the Hessians in several battles of the American Revolution. This led to the British rethinking their usage of PMCs. In doing so, the market for PMC usage continued to diminish from prior levels.

The declining use of PMC continued into the late 19th and 20th centuries, when mercenaries began to go underground or become rogue. Two new trends, one that made their use less necessary and another that made their use less tasteful, brought about the decline. The sovereignty of the state had taken hold throughout the world, and states could maintain their own militaries or have their sovereignty maintained by another state's military, e.g., the British Empire. The second trend was the international state's disdain they held toward mercenaries. In the public's opinion, mercenaries were viewed as cowboys or swashbucklers interested only in satisfying their own adventuresome desires rather than achieving long-term results. Many found employment in unstable areas; Africa, Latin America and parts of Asia offered great opportunities for mercenaries because decolonization led to immense civic unrest. Many succumbed to civil war as

¹² Singer, *Corporate Warriors*, 33.

¹³ Singer, *Corporate Warriors*, 33.

tribes and societies battled to regain power usurped by colonial authorities. At times the empiric power hired mercenaries to quell uprisings, thus limiting their armies' exposure in political hotbeds.¹⁴

While most mercenaries were going underground in the 20th century, the United States began to rely more and more on private military contractors. During WWII the Morrison-Knudsen Company helped develop Wake Island.¹⁵ Out of necessity, the contractors building the island for the Pacific campaign joined in the battle with the Marines in the attempt to stop the Japanese in December 1941. Another instance of PMC use in WWII is found in Claire Chennault's Flying Tigers—nickname of the American Flying Group. The individuals who flew were recruited primarily from the military. When they volunteered, they were released from the military to join the Central Aircraft Manufacturing Company. The new employees were paid twice as much as they received in their military equivalent role. All this was accomplished prior to December 7, 1941 and with White House knowledge. During Vietnam, "President Johnson avoided congressionally mandated troop ceilings by employing over 80,000 contractors during the most intense phase of the war."¹⁶ Additionally, CIA created its own mercenaries/private force in the form of Air America, Southern Air Transport, et al, in the Vietnam War. Yet this was not the resurrection of PMC. The resurgence of PMC began to occur around the same time as the end of the Cold War.

¹⁴ Singer, *Corporate Warriors*, 37.

¹⁵ Morrison-Knudsen was instrumental in the construction of some great American projects. These projects include Hoover Dam, the San Francisco Bay Bridge and the Trans-Alaskan Pipeline. Also, this company was a major contractor during the buildup that was resultant of the Cold War, i.e., Minuteman missile silos and Kennedy Space Center.

¹⁶ Schreier and Caparini, *Privatising Security*, 68.

The end of the Cold War saw the easing of tensions between the United States and the former Soviet Union, thus the demobilization of thousands of troops that had been previously prepared to annihilate the other. Suddenly unemployed, these warriors had prepared their entire lives for an event that never came to fruition. As in the case of anyone whose company downsizes, the troops looked to apply their learned skills in order to make a living. Trying to translate years of learned war-fighting skills doesn't necessarily translate into civilian sector jobs. And few opportunities even existed in the Russian Federation of States. Many troops, both U.S. and Former Soviet, were displaced due to the downsizing of the super powers. In order to survive, many turned their skill sets into security services versus training into existing civilian occupations. This caused a boom in security services, specifically the Private Military Companies.

The other phenomenon that was occurring at this time was globalization. A consequential dynamic of globalization was outsourcing. The United States decided that it no longer needed a vast military since the threat was removed, a so-called "peace dividend." It began to reduce the number of troops and replace some of their services by following the economic model of outsourcing. The company doing the outsourcing, in this case, was the U.S. Government (USG). Department of Defense (DoD) contracted out services that were not the core competency of combat, such as: ROTC training, maintenance, and base housing to name a few.

But DoD slowly began to outsource combat support operations. The numbers began to rise dramatically throughout the 1990s and continue to this day. The U.S. deployed around 600,000 troops for Desert Storm and deployed 9200 contractors, primarily for equipment maintenance, giving a troop to PMC ratio of 65-1. In

comparison, the GWOT, specifically Operation Iraqi Freedom, saw the number of deployed troops at the height of post-operations of 160,000. The number of deployed contractors rose to 180,000 in a variety of services, giving a higher than 1-1 troop to PMC ratio. In fact, contractors' numbers are greater than the combined coalition forces.

Table 1.1 shows the United States' use of contractors during its wars or conflicts as a ratio of military force on the battlefield.¹⁷

Table 1.1

War/Conflict	Civilians	Military	Ratio
Revolutionary War	1500 (est.)	9000	1:6 (est.)
Mexican/American	6000 (est.)	33000	1:6 (est.)
Civil War	200000 (est.)	1,000,000	1:5 (est.)
World War I	85,000	2,000,000	1:20
World War II	734,000	5,400,000	1:7
Korean Conflict	156,000	393,000	1:2.5
Vietnam Conflict	70,000	359,000	1:5
Desert Storm	9,200	600,000	1:65
Operation Iraqi Freedom	180,000 (est.)	165,000	0.91:1

Peter W. Singer attributes much of the modern day use of PMCs to four factors: demand for hired troops and “complementary relationship of mass military

¹⁷ Information from the Revolutionary War through the Vietnam conflict are from: Reber, Paula J., “Contractor Support on the Battlefield” (9 April 2002), quoted by Terry, Mark D., “Contingency Contracting and Contracted Logistics Support: A Force Multiplier” (Newport: Naval War College), 12 May 2003, 28.

demobilization in one zone to new wars in other weaker state zones,”¹⁸ areas of weak governments, and simple business practices. [The first three the author sees as the main drivers and the ones that will be stated in this chapter, and the fourth will be covered later.] The first case is simple economics. Nations found it more cost-effective to hire a professional unit to suppress the uprising or protect their assets than performing the task themselves. Additionally, these mercenaries could function more efficiently than those creating the uprising.

In the second case, one must look only at the recent demobilization of the former Soviet Union military. As the Soviet Union broke up, the fractionalization of the state meant that most of the military was incapable of being maintained. Therefore, it demobilized troops and decommissioned units and equipment. That action had a direct effect on the US military as well. With the Cold War “won”, the political and public factions did not see the need to spend great amounts of monies for a large military. Consequently, the US began to react in a similar but less pronounced fashion of demobilization. With both sides withdrawing from many territories, the peace their presence maintained was gone.

The third factor leading to rising PMC demand is weak governments. Many of the areas in which both the US and USSR maintained a presence were regimes supported by the super powers. With their militaries and the associated support removed, the ‘puppet’ governments, such as those found in Sudan and Zaire, were challenged and often replaced by tyrannical governments.¹⁹ These new governments threatened the stability and/or the valuable resources of the state. World opinion or resource interests

¹⁸ Singer, *Corporate Warriors*, 38.

¹⁹ Singer, *Corporate Warrior*, 55.

led to action. Since many of these conflicts were seen as internal in nature, it was rare that individual states would challenge the sovereignty or risks the political capital to intervene, thus the need for mercenaries to stabilize the governments or regions.

Weak governments lead to weak governance, which, in turn, leads to unstable regions. Many of these regions, such as the Balkans and Africa, led to PMCs and mercenaries. Power vacuums brought on civil war. Often the areas had large natural resource, such as Sierra Leone, in which others, whether nations for regional stability or corporations for access and profits, had a vested interest; either the state or the corporations hired PMCs or mercenaries to secure their interests.

Other factors have led to the U.S. specifically utilizing PMCs: globalization and the budgetary burden the US feels as the baby boomers retire. The effects of globalization have been dramatic. Corporations began to shed many aspects of their business in order to focus on their core competencies, such as Dow Chemical hiring Xerox to digitize 5.5 million document pages that reduced storage costs and led to instant retrieval of R&D documents.²⁰ While most think of automotive production when outsourcing is mentioned, that is an infinitesimal piece of outsourcing. The premise is not just focusing on core competencies, but in doing so creating a cost savings, which is the true basis for outsourcing. Company X offers to accomplish a service for company Y. Company X, a large corporation, makes widgets with the large ensuing administrative functions, one of which is manufacturing the widgets owner's manual. Company Y offers to produce the owner's manual and all book-like products for Company Y since that is their focus. In doing so, Company Y offers to produce these products at a 30%

²⁰ Xerox Website; <http://www.xeroxglobalservices.com/>; Document outsourcing: Dow Chemical Company (accessed March 13, 2008).

savings to Company X. Naturally, Company X wants to save the 30% to improve their bottom line and furthermore the stock's performance. Many other examples are stated in Thomas L. Friedman's *The World is Flat*.²¹

In essence, PMCs are a form of outsourcing. Yet history has shown that the use of PMCs is wrought with a lack of loyalty and effectiveness. Their loyalty is not in the defense of the nation that hired them but toward the money. The individuals weighed whether the cost was worth the risk. If they found that the pay was not worth the risk, then they would leave the battlefield, such as GSG's actions to Sierra Leone in 1995. GSG's abandonment of the contract caused Sierra Leone to hire Executive Outcomes to secure diamond mines.²²

Another impact is baby boomers retirements. Born between 1946 and 1964, Baby Boomers total 78 million as of a GAO report dated July 2006.²³ Those still living in 2008 will begin to retire, and the share of U.S. citizens at age 65 or older is expected to accelerate through 2050;²⁴ the share of the retired population in 2000 was 12.4% and projected to increase to 19.6% through 2030.²⁵ The GAO reported that the strain of this

²¹ Friedman, Thomas L., *The World is Flat: A Brief History of The Twenty-first Century*. (New York: Farrar, Straus and Giroux, 2006), 126-136.
Mr. Friedman postulates there are ten (10) items or events that 'flattened' the world. His theory, "The world is flat!" is a result of a golf experience in India. He came to realize that the through technology the playing field is leveling as well as accelerating. His ten attributes include the demise of the Berlin Wall, which is number one.

²² Singer, *Corporate Warriors*, 160.

²³ GAO Report, *Baby Boomer Generation: Retirement of Baby Boomer is unlikely to precipitate dramatic decline in market returns, but broader risks threaten retirement security*, United States Government Accountability Office (Washington D.C., July 2006), 6.

²⁴ GAO, 4.

²⁵ GAO, 9.

mass would burden the government system. As the old economic saying goes, once a resource is used it cannot be regained or used elsewhere. The U.S. government is committed to paying these benefits by law, specifically Sec 202 [42 U.S.C. 402].²⁶ Since it must pay these benefits, it must find another area to ‘pay’ for the benefits. By decreasing its commitments to other programs, it can save the money needed to fund Social Security. The transition to unmanned vehicle projects and utilizing the PMCs help the US government accomplish those goals. By utilizing unmanned vehicles, the government lessens the number of troops needed, thus less pay and benefits. Another considered benefit is fewer troops exposed to harm, which is a political hotbed within the U.S. Both help to alleviate the politically risky issues raised by tackling the issue head on.

As mentioned earlier, the military has been shedding services that are not regarded as essential for combat, i.e., operation of housing, many medical services, and even equipment periodic maintenance. The US military began to take this approach even further by outsourcing training. The USAF established training for certain aircraft through Flight Safety International. Flight Safety provides academic and simulator training for specific military aircraft.²⁷ The training is for both initial and recurring training. The approach was seen as lessening the demand for instructors to teach ground schools and recurring training. Most instructors are former military instructors in the same aircraft they are teaching. The instructors are solely dedicated to the subject

²⁶ 42 U.S.C. 402, Section 202.

²⁷ The training is for the C-5, KC-135, KC-10, JPATS and T-38. The information was acquired from the Flight Safety International—Military division website (www.fssc.com). The website reports that they train between “10,000 to 14,000 students student events annually and have been providing Aircrew Training Systems to the United States Air Force and its Air Reserve Forces since 1984.”

manner and are usually more knowledgeable than their students in depth. But contractual limitations often keep the instructors from branching out beyond the stated curriculum.

An example is if the USAF notices a trend in aircrew or aircraft performance in a specific area, the contract must be renegotiated to teach the new material. This process can be both lengthy and costly.

CHAPTER TWO—WHAT'S IN A NAME

In the chaos of a battle it is vital that you know who is your friend, your adversary, and the innocent bystanders. Now enter another entity. By most accounts this group is there to support you and your cause. This group is versed in some of your tactics but not on your frequency. This group may even dress as you but did not arrive in a tank. Instead they arrived in a Chevrolet Suburban. This group is not the UN, the Red Cross or other similar entities. This group is in the battlespace in order to supply your needs whether that is food, clean clothes, or ammunition. But what happens when the bullets start flying? Are these group combatants? Are they non-combatants? If non-combatants, are you obligated to protect them? (In some instances he may be as heavily armed as you.)

The above instance is but some of the issues to be answered. In order to do answer these questions, and those to follow, a proper definition of the aforementioned groups is necessary. This discussion is ongoing in many areas today. Scholars, lawmakers, governments, military organizations, and even relief organizations such as the Red Cross are attempting to categorize these groups.²⁸ Some viewpoints say they are mercenaries similar to those from which the name originates. Another viewpoint is that these are patriots who are helping their country. As is often the case, the answer probably lies somewhere in the middle. But a framework must be laid to establish a proper context for the remainder of this work. To begin this examination one must start at the most basic point. The one which many claim these new groups to be: mercenaries.

²⁸ Hays Parks, “Private Contractors and Civilian Employees” (ICRC executive meeting, October 25, 2005).

A mercenary is defined by Merriman-Webster's Dictionary as: "One that serves merely for wages; a soldier hired into Foreign Service; hired for service in the army of a foreign service."²⁹ The dictionary included *Microsoft Word* defines a mercenary as: "(noun) A professional soldier paid to fight for an army other than that of his or her country; somebody who works or serves only for personal profit; (adj.) paid to serve in a foreign army, or consisting of mercenaries."³⁰ Mercenaries are defined in many sources, most of which regulate, oversee or have jurisdiction of warfare.

In 1977, Protocol 1 amended the Geneva Convention of 1949 and within this Protocol provided a definition. Article 47 of the Geneva Convention has since defined a mercenary as:

...Any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Does, in fact, take a direct part in the hostilities;
- (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) Is not a member of the armed forces of a Party to the conflict; and
- (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.³¹

²⁹ *Merriman-Webster's Collegiate Dictionary, 11th Edition.* (Springfield, Massachusetts: Merriman-Webster Incorporated), 2003.

³⁰ Microsoft Word for Mac, 2004.

³¹ Geneva Convention, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* Article 47, 12 August 1949.

The U.N. later rendered its own definition during the 1989 72nd plenary meeting.

In submitting *A Resolution 44/34 for International Law*, it defined a mercenary, under International Convention against the Recruitment, Use, Financing and Training of Mercenaries:

Article 1

For the purposes of the present Convention,

1. A mercenary is any person who:
 - (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
 - (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
 - (d) Is not a member of the armed forces of a party to the conflict; and
 - (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
2. A mercenary is also any person who, in any other situation:
 - (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
 - (ii) Undermining the territorial integrity of a State;
 - (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
 - (c) Is neither a national nor a resident of the State against which such an act is directed;
 - (d) Has not been sent by a State on official duty; and
 - (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.³²

From these two definitions alone, one might draw the conclusion that the current PMC are indeed mercenaries. Yet in the next breath one might draw the conclusion that

³² United Nations General Assembly, 72nd plenary meeting, *International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries*, UN A/RES/44/34, 4 December 1989.

they are not. How can they be both a mercenary and not a mercenary? Does the individual or group have to meet one of the above sub-paragraphs or meet all to be classified a mercenary? Is it subjective or is it based upon their actions? The answer to the last two questions seem to be both.

The commonality between the two definitions is that a mercenary is recruited to fight in an armed conflict, motivated by personal gain for taking part, not a national of the party or a resident involved in the conflict, not a member of the armed force involved in the armed conflict or sent by the state that is not a party to the conflict on official duty. If one looks at that purist definition then the vast majority of participants in the current Iraq conflict likely are mercenaries since they are "...not a member of the armed forces to the conflict", as well as, many of the employees are not US citizens. But one must remember these individuals, and/or companies, are not recruited to participate in the conflict. They are there to provide supplies and support to those participating in the conflict. Therefore, they technically are not performing hostile acts except for the means of self-defense [more on this later]. While they are in it for personal gain, it is not in participation in direct conflict. Also, the U.N. definition implies, by the use of the word "and" in Article I, Para. 1, subpara. d., that all conditions be met for mercenary classification.

But it cannot stop at that point. One must delve more deeply into the context of not only the definitions but also the use and employment of those companies and individuals. Both organizations, the Geneva Convention and the UN, detail that the mercenary receives compensation greater than that given to combatants. To better explain this an example comparison between a military member and PMC of like specialty is needed.

USMC tradition is that all members are riflemen, regardless of whether they are a cook, truck driver, or aviator. Each is trained to defend his brethren. If the situation demands he is expected to take up arms and join the fight. For what he does, he is paid \$83-170 per day for a sergeant³³. In the current conflict, a Blackwater PSD contractor is paid \$600-\$1220 (See Appendix One) per day to do the same.³⁴ But one must consider more than just one instance, i.e. a PSD contractor vice a military sergeant. One must take into account the bigger picture of replacing many other internal services, for example logistics.

ESS (Eurest Support Services), a sub-contractor for Kellogg, Brown and Root (KBR) the U.S. Army's main logistics supplier, supplies the necessary logistics for "food services, supply logistics management, transportation, vehicle maintenance, facilities management and communications."³⁵ They provide these services for the troops and units in the field. ESS supplies this without bringing any capability to aid in the event of

³³ Pincus, Walter, "U.S. Pays Steep Price for Private Security in Iraq." *Washington Post*, October 1, 2007.

While the numbers Mr. Pincus quotes are accurate but are just a snapshot. He failed to take into account many of the items leading up to that point. He does not say if this sergeant is equally trained to the degree and sophistication the Blackwater individual is. A more in depth analysis of the costs for each side will be examined later in this paper. Also, he does not explain what costs are given or omitted from the \$83-170/day, i.e., medical, retirement, etc.

³⁴ House Committee on Oversight and Government Reform, *Hearing on Private Security Contracting in Iraq and Afghanistan*, 110th Congress, 1st Session, 2007.

³⁵ House Committee on Oversight and Government Reform, *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report*, 110th Congress, First Session, February 7, 2007.

Mr. Murray, represented ESS before the House Oversight committee on February 7, 2007, testified that he was a retired chief warrant officer from the US Army. While in the Army, his mission "often was to deliver food services and other logistics support to our troops. In Iraq, I carried out a similar mission as an employee of ESS." He went on to testify that ESS operated DFACS facilities in over a dozen sites and camp construction as a subcontractor of KBR, the US Army, USMC, and Department of State. He stated that the cost of security was higher than anticipated because ESS was "...compelled...to hire private security firms to move its personnel and supplies among DFACs." Mr. Murray mentions, "ESS moved most of its supplies through sporadic military-escorted convoys." Therefore, one can see that the same task was being performed by a recruited contractor that would be performed by a military member.

hostilities. ESS is reliant on someone else to supply protection. ESS hired Blackwater for said protection.³⁶ ESS had zero firepower to support itself. If attacked, it cannot defend itself. Additionally, their support to troops is dramatically hampered, or stopped altogether, when hostilities are high. Therefore, the troops can lose support in a multitude of ways. But they, ESS, are recruited to do the same job, but at a much higher pay, as say Jessica Lynch's unit, whose convoy got lost delivering supplies to their unit in the field. As the U.S. military moves more toward contractors replacing these logistics units, one of two things must happen: contractors arming themselves for protection, or the uniformed services supply the protection. In doing so, costs will rise and firepower is potentially lost. All of which are counter to the premise that contractor use is cheaper.

[The legal implications will be examined will be shown in a later chapter.]

Another consideration in the definition is in the paragraph 2 of the UN Article I. It defines the mercenary as "...any person who, in any other situation: (a) Is specially recruited...for the purpose of participating in a concerted act of violence aimed at...(ii) Undermining the territorial integrity of a State."³⁷ As stated previously, the current batch of contractors were not specifically recruited for violence but to supply the logistics necessary for the military's success. Agreed, but is it undermining the territorial integrity of the state? L. Paul Bremer, as the Administrator of the Coalition Provisional Authority in Iraq, instituted *Coalition Provisional Authority Order 17* just prior to leaving that post.

³⁶ Scahill, Jeremy, *Blackwater: The Rise of the World's Most Powerful Mercenary Army*. (New York, NY: Nation Books, 2007), 87.

March 8 and 12, 2004 Blackwater signed contract to provide protection to ESS. On March 31, 2004, four Blackwater personnel were killed in Fallujah. The results of that attack resonate through the minds of most Americans as their charred and maimed bodies hanged from the bridge. The events first placed Blackwater under the microscope, which continues through the writing of this work.

³⁷ UN A/ RES/ 44/34, 4 December 1989.

Order 17 defines contractors and grants immunity from Iraqi law.³⁸ Then the Iraqi's constitution was passed touting sovereignty, although questions remain if *Order 17* is rescinded. Hence, if the Iraqi constitution establishes the Iraqi law, are the contractors challenging the sovereignty of the state, in light of the UN definition? Looking at the strict interpretation of the UN Resolution, the answer would be "No". The reason is that these individuals or groups were not recruited for the purpose of participating in a concerted act of violence aimed at undermining the territorial integrity of the state. While some acts maybe outside the Iraqi Constitution, it does not fit the aforementioned definitions.

Some of the contractors in the area today are acting as rogue entities, knowing they are impervious to the law.³⁹ They know their actions are not subject to the Iraqi Law or American jurisdiction. If they are subject to either, no precedent or charges have been established.⁴⁰ If those capabilities were still performed by the military, those individuals would be subject to the Uniformed Code of Military Justice (UCMJ). If they were tried and found guilty, they would be prosecuted and eventually discharged.⁴¹ It is

³⁸ CPA order 17, Section 4, paragraph 3 states: "*Contractors shall be immune from Iraqi legal process with respect to act performed by them pursuant to the terms and conditions of a Contract or any subcontract thereto. Nothing in this provision shall prohibit MNF (Multi-National Force) Personnel from preventing acts of serious misconduct by Contractors, or otherwise temporarily detaining any Contractors who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State. In all such circumstances, the appropriate senior representative of the Contractor's Sending State in Iraq shall be notified.*" Yet the next paragraph, number 4, states: "*Except as provided in the Order, all Contractors shall respect relevant Iraqi laws, including the Regulations, Orders, Memoranda and Public Notices issued by the Administrator of the CPA.*"

³⁹ Brigadier General Karl Horst, interview by the author, Norfolk, VA, January, 2008.

⁴⁰ Horst interview.

⁴¹ The topic of legality, jurisdiction and who has oversight/authority will be examined in depth later in this paper.

important to properly categorize these organizations and their individuals in order to establish legal control.

CATEGORIZATION

P.W. Singer spends an entire chapter (Chapter Three) in his book “*Corporate Warriors*” trying to define the landscape. He considers all the different aspects under which contractors work. While he admits today’s companies have similarities to mercenaries, Singer considers most are not. One of the key differentials is that PMFs—Private Military Firms, interchangeable with PMCs in Singer’s definitions—are “...parallel to the development of the modern business organization.”⁴² In fact, some actually trade within stock markets and in doing so come under the scrutiny of stockholders and board of directors. Later in his writing, he further delineates the groups via his “Tip of the Spear Typology,”⁴³ which is based upon the group’s battlefield location. They range from support firms (non-lethal aid; logistics, intelligence, technical support), consulting firms (provide advisory and training services, strategic, operational and organizational analysis), and military provider firms (focused on tactical operations, engaged in actual fighting or command of those who are fighting).⁴⁴

In a paper for the Geneva Centre for the Democratic Control of Armed Forces, Mr. Fred Schreier and Ms. Marina Caparini discuss labels for Private Military Companies. They reference Mr. Singer’s descriptions but offer a simpler aspect.

⁴² Singer, *Corporate Warriors*, 45.

⁴³ Singer, *Corporate Warriors*, 93.

⁴⁴ Singer, *Corporate Warriors*, 92-97.

Schreier and Caparini contend is that proper labeling is one of the main issues around this subject. “A difficult and not yet satisfactorily resolved problem is the categorization of PMCs...because these companies cover such a wide range of people, activities, and services.”⁴⁵ They not only include those involved in the battlefield, but also roll into the equation those in the field of home security. They even reference another categorization, Herbert Wulf’s, which are more extensive than any other seen.⁴⁶ Yet they seem to offer little clarity on the issue.

So what are these groups? Are they mercenaries or entrepreneurial ventures whose business is centered on a segment of the military-industrial complex? Just in the brief discussion above, one sees that determining what tag to hang on these groups is at best difficult and typically impossible. Yet PMC is the common moniker used and is becoming the accepted term, just as Band-Aid® is for adhesive bandages. But is PMC an appropriate tag? Is PMC an overarching moniker or a specific one?

Originally, the author considered an alternative proposal based upon several factors dependent on whether or not they were armed. But it cannot be limited to only those that carry arms. Another consideration was based upon their job function. But that was flawed because to base it solely upon the job that they are executing is impossible since many organizations have multiple divisions that can cover the breadth of contractual affairs on the battlefield. Yet to call them ‘Private’ when some are publicly

⁴⁵ Schreier and Caparini, *Privatising Security*, 33.

⁴⁶ Schreier and Caparini, *Privatising Security*, 39-40. Herbert Wulf’s reference from the 2002 and 2005 articles were not examined in depth for this paper. The extent to which this conversation goes is beyond the scope of this paper’s intent.

traded seems to carry incorrect nomenclature as well. Yet one cannot state that they are a public organization resembling the military they supplement since these entities are not a direct extension of the government. The name cannot be limited to contractors, another common term utilized for individuals and groups, because that term is too broad as well. Boeing, General Dynamics, Lockheed, et al, are contractors in other sets of military circles.

Even the United States Government is vague in the labeling the PMC business. Actually, it is a stretch to label them according to industry standards. The U.S. Census Bureau compiles a list of job occupations, called *North American Industry Classification System* (NAICS). The 2002 version, a 2007 updated version was awaiting release at the time of writing, has no mention of their services unless the placement is under 541614 Process, Physical Distribution, and Logistics Consulting Services, 541618: Other Management Consulting Services, or 5616: Investigation and Security Services.⁴⁷ These still seem inadequate. And is this issue even relevant? Resolution is difficult but it is very relevant.

Others, who have many degrees after their name, have spent much time trying to put a tag on these organizations, as you can tell from the previous pages. But most are inadequate, too simple, or simply wrong. PMCs are widely accepted and typically the referenced lexicon used when discussing these companies. While a fine name, it is incorrect, on a few points. In the term of 'Private', not all companies are private, some, are publicly traded. Moreover, some definitions of 'Private' are: "not supported by

⁴⁷ U.S. Census Bureau, *North American Industry Classification System*, <http://www.census.gov/epcd/naics02/naicod02.htm> Bureau of Census. Washington, D.C. 2002.

government funding.”⁴⁸ Granted that Merriam-Webster’s Dictionary defines ‘private’ as: “belonging to or concerning an individual person, company, or interest.”⁴⁹ That same definition renders: “carried on by the individual independently of the usual institutions.”⁵⁰ A ‘private company’ (or enterprise) is defined as: “business activities that are not regulated by the government.”⁵¹ While most of these organizations are privately held, lumping all as private is incorrect.

The second area, which is improperly designated, is the term ‘Military’. Merriam-Webster’s defines a military as: “1a. Of or relating to soldier, arms, or war; b. of or relating to armed forces; esp.: of or relating to ground or sometimes ground and air forces as opposed to naval forces. 2a. Performed or made by armed forces.”⁵² While these entities do work inside the military zones, they are neither military nor necessarily relating to a soldier or war. Granted some carry weapons, but not all do or are allowed. Therefore, the military moniker must be changed.

A name that is more reflective is needed. Sarah Percy makes the point in her *“Morality and Regulation”* that: “The industry works actively to demonstrate that it is not ‘mercenary’ and seeks to distance itself from *its more unsavoury ancestors*. *The difficulty is that moral objections to private force reveal there are very clear line of descent from mercenaries through the PMCs and to the private security companies of*

⁴⁸ Microsoft for Mac dictionary, 2004.

⁴⁹ Merriam-Webster’s 11th Ed. Dictionary.

⁵⁰ Merriam-Webster’s 11th Ed. Dictionary.

⁵¹ Microsoft for Mac dictionary, 2004.

⁵² Merriam-Webster’s 11th Ed. Dictionary.

*today.”*⁵³ (Emphasis added) In other words a rose by any other name is still a rose. But if these organizations are not called mercenaries and PMCs are inadequate or inappropriate, what is the correct term? What characteristics do these companies have in common that accurately identifies them?

PROPOSED NAME CHANGE

This issue is significant for a variety of reasons. If the United States continues to rely more on these entities to execute its National Defense Strategy, classification needs to be resolved so that the proper regulations and oversight can be given. Ambiguity leaves options available to execute strategies that may be less than acceptable to public opinion or, more importantly, the rule of law. Therefore, a new classification is needed that possess sub-division in the order of the NAICS system. The overall classification would be called **Battlespace Services Provider**. Within this arrangement the sub-categories would be based upon their battlespace actions. As stated earlier the difficulty arises in when a companies’ division is utilized in several different areas. Nonetheless, an attempt should be made. Those that provide logistics would be separated from those that provide consulting aspects. Companies providing defense postures and personal security need to be separated from those providing offensive capabilities—difficult to differentiate in most cases.

⁵³ Percy, Sarah. “Morality and Regulation.” In *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, edited by Simon Chesterman and Chia Lenhardt, 11-29. New York: Oxford University Press, 2007.

If the USG is going to rely on these companies more and more, it is important that proper designations be incorporated into the Bureau of Labor Lexicon. These companies must be separated from the aforementioned contractors, the likes of Boeing, Lockheed, etc. The separation is important in the aspect of legal issues and cost tracking.

Battlespace Provider is an overarching name, but that it still requires some tightening. First, each is part of a business enterprise. The ‘C’ (company) in PMC was the only piece that seems to accurately apply. Looking at the definition of company one finds it described as “a chartered commercial organization or medieval trade guild; an association of persons for carrying on a commercial or industrial enterprise.”⁵⁴ Interestingly, the same entry renders the definition of “a body of soldiers; esp.: a unit (as of infantry) consisting usually of a headquarters and two or more platoons.”⁵⁵ With this loop back to military heritage, it seems inappropriate to leave the ‘C’ as well. Therefore, the ‘C’ should be altered to ‘Commercial’. The definition of commercial is “occupied with or engaged in commerce or work intended for commerce; viewed with regard to profit.”⁵⁶ It is without a doubt those involved in this work are profit driven, as any company should be.⁵⁷

⁵⁴ Merriam-Webster’s 11th Ed. Dictionary.

⁵⁵ Merriam-Webster’s 11th Ed. Dictionary. One wonders if this definition was known when the designation of PMC was chosen.

⁵⁶ Merriam-Webster’s 11th Ed. Dictionary.

⁵⁷ In fact some have offered that is the only focus. Jeremy Scahill’s *‘Blackwater: The Rise of the World’s Most Powerful Mercenary Army’*, (New York: Avalon, 2007), states that the lawsuit by the Fallujah victim’s families accuse the company of attempting to save money at the cost of lives. The accusations are that the company did not provide the necessary personnel and equipment for the sake of cost-savings.

Second is the location of the work. As previously mentioned not all contractors work in the battlefield environment. A variety of contractors serve in differing capacity. What separates these entities from those who take care of stateside work, such as base housing, is their occupation in support of, or in conjunction with the warriors. If they are not building the camps, supplying the food, providing security, they may be performing ISR (Intelligence, Surveillance, and Reconnaissance) through a variety of platforms. This location is vital for what they have contracted to do. (The legality of them actually doing it will be discussed later.) Therefore, the second letter, 'B', signifies the 'Battlespace' location.

The third characteristic is difficult to put into context considering the wide variety of product offerings. In attempting to establish a name as the umbrella of the industry, one must ask a basic question: "What does the industry do?" Overall this industry follows the resulting globalization endeavors within the US economy: Service. In their most basic element these commercial enterprises are part of the service industry. The U.S. Bureau of Labor states the Service-providing industry "(i)ncludes trade, transportation, and utilities; information; financial activities; professional and business services; education and health services; leisure and hospitality; other services."⁵⁸ In the broadest terms that is what they do. They provide a service for the military or other Battlespace government organization, i.e., State Department. It is an easy fit to list these companies within the Service-providing industry. Therefore, add a 'S', for Service, to the list.

⁵⁸ US Census Bureau website.

The final piece in defining these actors is more along the lines of the “What?” part of the question. The three previous letters have been adjectives. The last one is the actual noun. It seems obvious that all these entities are contractors, that is a given. But many of the company employees are individual contractors themselves. Being able to distinguish between the company who has a contract with the USG and the individual that is working in the field for the contracted company, as a contractor is needed. The dictionary renders a synonym for contractor: “Service Provider.”⁵⁹ Therefore, the natural fit to the descriptor is ‘P’ for ‘Provider’.

The culmination of these is CBSP (Commercial Battlespace Service Provider). As difficult as it is to grasp the true nature of these companies and the seemingly ‘pre-ordained’ PMC appellation, it is unlikely this new designation will be accepted. But the proposal is not made lightly. As stated earlier, PMC is either inadequate or wrong. Mercenary is considered en vogue although some believe that a fine line exists between the mercenaries of yesterday and the companies of today—and some believe the line connects the two. Therefore, this new designation, CBSP, should be considered the most accurate in the naming modus operandi and helps to establish and clarify legal implications.

⁵⁹ Microsoft dictionary for Mac 2004.

CHAPTER THREE—LEGAL REVIEW

Perhaps no function of government is deemed more quintessentially a “state” function than the military protection of the state itself. Indeed, scholars of privatization in the domestic sphere have often assumed that privatization of the military is one area where privatization does not, or should not, occur. For example, some have argued that, by hiring private armies to keep itself secure, the state would threaten its own very existence because it would have no way to control these private military sectors.⁶⁰

The last chapter showed the importance of naming to set the proper context. The legalities of CBSPs are as staggering as the naming convention, but in stating the obvious, the impact is much greater. The questions of regulation are beginning to emerge as CBSPs become more prominent. As stated in the earlier chapter, there are regulations against mercenaries but great debates continue about whether these apply or whether new ones need to be created. Not only are the mercenary rules discussed, legal experts discuss other implications to include political. Within the halls of the USG a variety of other regulations are mentioned: International Traffic in Arms Regulations (ITAR), Arms Export Control Act of 1976, Export Administration Regulation, Defense Trade Controls Overview, to name a few. The discussions concern how these apply, how to enforce them, and who is responsible for enforcement. Furthermore, some have insisted that the CBSPs need regulation in more than the battlespace actions. Some have introduced legislation proposals that these groups also require some limits when it comes to political interactions. It is necessary to examine this relationship because of the implications on

⁶⁰ Dickinson, Laura A. *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, (Williamsburg: William & Mary Law Review, 2005), 5.

decision makers brought by the CBSPs' capabilities and the nature of their business. Rules existed prohibiting US military members from participating in political issues. But the same are not in place limiting the CBSPs' lobbying.

Actions by the CBSPs require boundaries and oversight. Further, penalties need to be enforced if the rules are not followed or created if they do not exist. This chapter will study: current regulations and what additional rules are needed, if any, who should be responsible, who should be the governing body, and how to institute the rules and punitive damages.

The difficulties are not as simple and straightforward as one would hope. The challenges facing all parties are tremendous. The issues are not relegated only to the government where the CBSPs' headquarters reside. The matter lies on those that hire CBSPs: governments, the entities (NGOs, businesses, et al.), the location of the activity, the international community (UN/Geneva Convention), and the CBSP themselves. The current state of affairs in Iraq brings to light the importance of establishing proper control. The intent of this chapter is not in the scope of a legal document, law review, or even to divulge all of the possible laws that may affect the CBSPs, their actions or those that hire them. Instead, this chapter will take a broad view of the legal complexities surrounding CBSPs. It will offer an examination of the situation when CBSPs' action may fall into an area counter to the commander's intent. Hopefully, this will spur all actors to make serious efforts to examine the legal ramifications associated with CBSP utilization. This chapter will highlight the murkiness.⁶¹

⁶¹ A disclaimer: The author is not a legal expert. Legal reviews were studied from a variety of sources. Each review had different positions. Few offered solutions, but most argued that the legal issued is far

CURRENT LAWS

As stated above, the legal status of the CBSPs is a gray area. That should not be interpreted that no laws exist to regulate the organizations or those employed by the organization. Many laws exist to regulate them, but little to no precedent has been established in order to validate the law. Examples where precedent could be established are the Abu Ghraib prison interrogation/torture incident and the Blackwater shootings in Nisoor Square. These two incidents are often discussed and examined in the legal context. Both events provide the opportunity to validate current laws or determine what modifications are needed. Yet, to date, no legal proceedings have been brought against any one person or company involved in either situation.⁶²

Legal scholars have been debating the issue of what laws contractors fall under. Some have stipulated that the contract itself should set the standards but then the issue of who enforces the contract and its standards becomes the argument.⁶³ Others have argued

from settled. Most reviews discussed the vague legal status in which CBSPs operate. Therefore, a broad approach to this section is taken.

⁶² At the time of this writing, the Blackwater incident is still being investigated by an onsite FBI team. The Iraqi government is directing that Blackwater's enterprise be removed from Iraq in the near future. DOS is determining and negotiating if that will occur, through either a contract being allowed to lapse or by removing them early. A US Army investigative team stated that their investigation revealed that Blackwater instigated the actions. This is counter to what Blackwater has publicly stated. It is unlikely that the resolution to the matter, i.e. the legal aspect, will be accomplished prior to the end of this writing.

Conversely, the Abu Ghraib occurrence did have legal resolution. All of the convictions were against military members only. Each conviction was based on violations of the Uniformed Code of Military Justice (UCMJ—the military laws). Punishment ranged from letters of reprimands to convictions of aggravated assault. No one was convicted of the detainee's deaths. It is a known fact that contractors with CACI of Arlington, VA and Titan Corporation of San Diego, CA were involved in the incidents. No contractor has been pressed with any charges much less convicted of any aspect of the case.

⁶³ In November 2007, the US Army's contract oversight personnel were mandated to grow by 25%. The grounds given for the lacking numbers is attributed to the drawdown after the Cold War. P.W. Singer, in his book *Corporate Warriors*, states the number of contracts worth billions of dollars is overseen by only 14 people.

that the laws already exist under the UN and Geneva conventions. The counterpoint to this is that the contractors are not in violation because they are citizens of the state involved in the conflict.⁶⁴ The U.S Congress has attempted to close the loophole by amending the Uniformed Code of Military Justice. Senator Lindsey Graham (R-SC) tendered the amendment. [The interesting part is that Senator Graham is a reservist Judge Advocate General (JAG—military lawyer) as well.] But the amendment, while awaiting approval, raises the questions whether civilians can fall under military authority. This is a reversal of the U.S. Constitution basis, which establishes civilian control over the military. But the UCMJ does have a stipulation regarding those who are “...under treaty or agreement which the United States is or may be a party to any accepted rule of international law, persons *serving with, employed by, or accompanying* [emphasis added] the armed forces outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam and the Virgin Islands.”⁶⁵ In other words, those employed by and serving with troops outside the U.S. and its territories, are subject to the UCMJ. Yet no precedent exists where this article has been imposed on a civilian. U.S. military attorneys have questioned how to interpret the law and its applicability. The one law that seems to hold the greatest legal bearing is Public Law 106-523, November 22, 2000, *Military Extraterritorial Jurisdiction Act of 2000*, known as MEJA.

As the name implies, MEJA establishes legal jurisdiction outside the territory of the United States. The act establishes not only the jurisdiction but also who falls under

⁶⁴ This only applies if citizens are, in the case of the Iraq issues, either Coalition or Iraqi. If a contractor is none of these, for example a Ghurka, then that person could under U.N. definitions be considered a mercenary.

⁶⁵ Congressional Code of Uniformed Code of Military Justice: Section 802, Article 2, para. A, subpara. 11.

its authority. The law states that Title 18 is amended to apply to “Criminal offenses committed by...persons employed by or accompanying the Armed Forces outside the United States”⁶⁶ The law applies to those under its authority if the act they commit is “...punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States.”⁶⁷ While straightforward, several questions abound regarding the MEJA law. If the individual goes to trial, he has the right to cross-examine witnesses. How is this accomplished? Legal experts state that the accused have to be transported to U.S. courts for legal proceedings. Another question regards evidence. Who has the responsibility to gather, ensure the validity, and maintain the ‘purity’ of the evidence? Many areas of the world are not as stringent as the U.S. on evidence collection, and such places, i.e. Iraq and Afghanistan, is where the U.S. military is operating.

Devin R. Desai’s article, *Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies*, says that MEJA has too narrow a focus. He recommends Congress broaden MEJA to encompass non-DoD contracts. Any contracts written between a government entity and a contractor “...Under the definition of ITAR” would be a good starting point.⁶⁸

⁶⁶ U.S. Public Law 106-523, Military Extraterritorial Jurisdiction Act (MEJA), November 22, 2000.

⁶⁷ MEJA, 3261

⁶⁸ Desai, Devin R., *Have Your Cake And Eat It Too: A Proposal For A Layered Approach To Regulation Private Military Companies*, (San Francisco: University of San Francisco School of Law Review, Summer 2005), 13.

Another MEJA interpretation was submitted by Martha Minow's legal brief article.⁶⁹ She points out that the control is limited: "employees are not governed by military discipline or norms; nor are they regulated by rules that apply only to government actors, such as the FOIA (Freedom of Information Act), limits on political activities, and conflict of interest rules."⁷⁰ Her argument states that it can be viewed from both perspectives that the application could or could not apply.

Only one instance can be found where MEJA was imposed upon a civilian. Surprisingly it was used against a military spouse who had committed a crime against her husband on an overseas military installation. Many have questioned why this is not utilized against contractors. But the SecDef holds the authority to execute this law. This raises the question whether the SecDef is the right place for this authority to rest. It seems that a conflict of interest exists when the law executing authority is the same as one of the contractual signees. But if not the SecDef, then who? It seems that the Department of Justice offices should have this power. By giving this authority to those trained in legal matters and versed in implementing law, proper execution would be followed more often than not. But does this resolve the aforementioned issues surrounding the Blackwater incident in Nisoor Square? The answer is no.

Blackwater is currently under contract with the US State Department. They are not under the provisions, which these laws cover. State Department has their own lines of authority and law execution. In fact, State falls under standard U.S. laws.

⁶⁹ Minow, Martha, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, (Boston: Boston College Law Review, September, 2005), 9.

⁷⁰ Minow, *Outsourcing Power*, 9.

Interestingly, recent developments, resultant of the Blackwater incident, State Department granted DoD oversight of all State Department contractors in Iraq. Outwardly this seems to settle the issue but in reality it makes it worse. If Blackwater contractually works for the State Department, what authority does DoD have over Blackwater? It appears to have none. No oversight leads to a plethora of problems: cost overruns, illegal activities, and rules of engagement infractions, to name a few that have occurred in the past decade with USG CBSPs.

Another law that can affect CBSPs is the Alien Tort Claims Act of 1789. It was part of the nation's original judiciary acts. The law lies within U.S. Code (U.S.C.), Title 28 grants Judicial and Judiciary procedure. Continuing the course within the U.S.C., one finds that the Alien Tort Claims Act falls under Part IV, which directs jurisdiction and venue. It also lies in Chapter 85 that is specific to District courts. The specific explanation of the Act is in §1330. This is the Act itself. It defines the Alien Tort Claim Act as: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁷¹ The one significant part of this law is that the accused perpetrator must be in the United States. No means of extradition is implied or given under this law. But what does this mean and how does it apply to the topic of CBSPs? The answer is found in the precedent established in the *Filartiga v. Pena-Irala* case.⁷²

⁷¹ Alien Tort Claims Act (ATCA) 28 U.S.C §1330

⁷² *Filartiga v. Pena-Irala* set the precedent for U.S. courts to punish for tortious acts outside the U.S that were in violation of the law of nations or treaties to which the U.S is a party. In doing so, U.S. jurisdiction was extended worldwide.

The Act's original intent is still debated today. Most scholars say the law was probably intended to curb piracy, which was prevalent in that era. It lay dormant for several decades but has seen its uses rejuvenation since the 1980s. In 1980, the case of *Filartiga v. Pena-Irala* found its way into the U.S. District court. The case was a result of Joelito Filartiga's torture in Paraguay. His family, all citizens of Paraguay, brought legal action against Americo Norberto Pena-Irala, also a citizen of Paraguay residing in Brooklyn at the time, for "...wrongfully causing the death of...Joelito."⁷³ Judge Irving Robert Kaufman rendered the decision that "...the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norm of international law."⁷⁴ Judge Kaufman continued:

Implementing the constitutional mandate for national control over foreign relations, the First Congress established original district court jurisdiction over 'all causes where an alien sues for a tort only (committed) in violation of the law of nation'... we hold that deliberate torture perpetrated under color of official authority violates universally accepted norm of the international law of human rights, regardless of the nationality of the parties.⁷⁵

Since that verdict, the Act was modified through the addition of the Torture Victim Prevention Act of 1991. That provision states:

a) Makes clear that it creates liability under U.S. law where under "color of law, of any foreign nation" an individual is subject to torture or "extrajudicial killing," and

⁷³ *Filartiga v. Pena-Irala*, 630 F.2d 876 (June 30, 1980).

⁷⁴ *Filartiga v. Pena-Irala*

⁷⁵ *Filartiga v. Pena-Irala*

(b) Extends its remedy not only to aliens but to any “individual,” thus covering citizens of the United States as well. The TVPA thus recognizes explicitly what was perhaps implicit in the Act of 1789 – that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights (at least with regard to torture) is *ipso facto* a violation of U.S. domestic law.⁷⁶

The key statement for this monograph is the term “extrajudicial killing.”

(Although the Abu Ghraib event was one of torture.) Merriam-Webster’s defines extrajudicial as “done in contravention of due process of law: an execution.”⁷⁷ This definition has been utilized repeatedly in the recent past regarding mass killings and members of the military killing innocent non-combatants.

In the light of these laws, the members of CBSPs could be held liable once they return to the United States. One problem is finding proof that the accused performed the act that breaks the law. The environment, as in Iraq, may not allow the evidence to be acquired, or keep it from becoming tainted.

One other major law often considered regarding CBSPs regulation is the International Traffic in Arms Regulation, or ITAR. This regulation is property of the State Department. In other words, State department is responsible for the “...control of the permanent and temporary export and temporary import of defense articles and services.”⁷⁸ It comes from the President who delegates it to the Secretary of State’s

⁷⁶ ATCA, 28 U.S.C §1350.

⁷⁷ Merriam-Webster’s 11th Ed. Dictionary.

⁷⁸ 22 CFR International Traffic in Arms Regulation U.S.C. §2778. Paragraph §120.18 defines temporary import as “...bringing into the United States from a foreign country any defense article that is to be returned to the country from which it was shipped or taken, or any defense article that is in transit to another foreign destination. Temporary import includes withdrawal of a defense article from a customs

authority as to who can work in these endeavors. This law oversees many aspects of defense business in the area of exporting/importing. It stipulates seemingly most possibilities in the realm of arms. The law also requires that those involved in this enterprise must register with and obtain a license from the U.S Government.

ITAR also defines what cannot be exported in Part §121. (See Appendix Two) Many Iraq CBSPs have utilized many of the Part 121 items listed. Some companies are designing and producing their own combat vehicles, an act that may be in direct violation of this law. CBSPs can utilize them if they have permissions/license from the State Department. But with the unknown numbers of contractors in the battlespace, multiple contracts for multiple organizations, sub-contractors, et al., one begins to see the problem tracking this part.

In October 2005, DoD offered some guidance (DoD Instruction 3020.41) regarding contractors in the battlespace. Some key points to remember:

- a) This occurred two and a half years after the war began and two years after the term “Mission Complete” was emphasized to the world.
- b) The United States had spent more than a decade moving in the direction of utilizing contract help in the battlefield.

The purpose seems to bridge a gap of lacking oversight of the sheer number of contractors in the battlespace. Prior to this release, each service—Army, Navy, Air Force and Marines—had developed procedures to incorporate contractors in the battlefield. Yet

bonded warehouse or foreign trade zone for the purpose of returning it to the country of origin or country from which it was shipped or for shipment to another foreign destination.”

these manuals address only the planning and administrative functions; they do not address legal delineations. With the number of and reliance on contractors growing, DoD developed general procedures for their contractors. DoD conceived DoD Instruction 3020.41.⁷⁹

As with all DoD policy documents, the purpose is stated up front. “Under the authority of references (a) and (b), this Instruction establishes and implements policy and guidance, assigns responsibilities, and serves as a comprehensive source of DoD policy and procedures concerning DoD contractor personnel authorized to accompany the U.S. Armed Forces.”⁸⁰ The instruction lays out who is responsible for what and when. DoD must maintain a database that provides:

...by-name accountability of all CDF, and contain, or link to, minimum contract information (e.g., contract number, company contact information, sponsoring military unit contact information, and a summary of services or capability provided by the contract) necessary to establish and maintain CDF personnel accountability and visibility of contract capability in the AOR.⁸¹

Additionally, it is implied in Section 4.7 that each CDF (contractors deploying with the force) should process through the Joint Reception Center (JRC). This is at the discretion of the Combatant Commander responsible for the events in his area, but the Under Secretary of Defense for Acquisitions, Technology and Logistics can waive it.⁸²

⁷⁹ It is worth reminding the reader that these procedures have no bearing upon the current issue regarding Blackwater in the Nisoor Square incident since it was performed under a State Department contract.

⁸⁰ DoD Instruction 3020.41, (Washington D.C.: Department of Defense, October 3, 2005), 1.

⁸¹ DoD Instruction 3020.41, 10.

⁸² DoD Instruction 3020.41, 3.

Technically, contractors can go into the area without the COCOM's knowledge. It seems that this is contradictory to the commander's command and control responsibilities. The commander may have these companies in his area accompanying forces under his responsibility, yet they, the companies, may be relieved from supplying necessary information or even make themselves known other than to those they are immediately accompanying.

DoD Instructions 3020.41, Section 6 describes the procedures associated with contractors. It clarifies, from the DoD perspective, many of the aspects related with contractors. Some of those addressed are: "contractor legal status; planning requirements; visibility; deployment, theater reception, and in-theater management processes; force protection and security."⁸³ The instruction mandates that the "DoD components shall abide by applicable laws, regulations, DoD policy, and international agreements as they relate to contingency contractor personnel supporting contingency operations."⁸⁴

This section is important, in terms of legality, and speaks to both international and U.S. laws. It states that, if captured, the contractors are granted Prisoner of War status. To meet this statement, the individual(s) would have to be designated and given an "ID card under the provision of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) (reference (j))."⁸⁵ The most interesting position in this section is pertains to U.S. laws. Paragraph 6.1.3. specifically addresses U.S. Laws applicability.

⁸³ DoD Instruction 3020.41, 6.

⁸⁴ DoD Instruction 3020.41, 6.

⁸⁵ DoD Instruction 3020.41, 6. This statement points back to Article 4, Para. A, Section 4 of the 1949 Geneva Convention.

“Contingency contractor personnel remain subject to U.S. laws and regulations. For example, contingency contractor personnel fulfilling contracts with the U.S. Armed Forces may be subject to prosecution under Federal law.”⁸⁶ Section 6 mentions the laws to be used. MEJA is one law that could be used to prosecute an individual who has overstepped the legal bounds. But if there is an official declaration of war, then the UCMJ is to be utilized. But a formal declaration of war has not been made in the US since WWII.

Section 6.1.4 stipulates that “(t)he contract is the principal legal basis for the relationship between the Department of Defense and the contractor.”⁸⁷ Furthermore in Section 6.3.3, the contractor is to ensure that those under contract...

...perform under the terms of the contract; comply with theater orders, and applicable directives, laws, and regulations; and maintain employee discipline. The contracting officer, or designee, is the liaison between the commander and the defense contractor for directing or controlling contractor performance because commanders have no direct contractual relationship with the defense contractor.⁸⁸

Therefore, the issue seems clear. But it is not if the contract does not address those issues specifically. As with all legal documents, omission of an item means it does not apply. Since military members are always under UCMJ laws, commanders do not include those in operational plans for the theater. With the exception of a declared war, the contract should state exactly what laws apply. In omitting applicable laws statements in the contract, the contractor is given a pass by not addressing which if any laws apply.

⁸⁶ DoD Instruction 3020.41, 7.

⁸⁷ DoD Instruction 3020.41, 7.

⁸⁸ DoD Instruction 3020.41, 15.

Continuing in Section 6.3.3, with the exception of the criminal jurisdiction, the contractor is responsible for the conduct of their employees.⁸⁹ The policy also limits the power of the commander “...to take disciplinary action against contingency contractor personnel.”⁹⁰ The options listed for the commander are:

- a)Revoking or suspending security access, or
- b)Imposing facility restrictions.
- c)Getting Department of Justice (DoJ) involved to prosecute, absent of a formal war declaration, using Federal Laws.

Additionally, it is stipulated that domestic laws of the host nation are to be imposed “...absent of a SOFA or international agreement to the contrary.”⁹¹ Regardless, if a disciplinary problem occurs, the commander is to involve the legal staff, contracting officer and management team of the contractor.

Naturally all of this has generated much discussion as to what law(s) apply, who is responsible for enforcement, and how to prosecute if needed. Revisiting Mr. Desai’s legal brief in the *University of San Francisco of Law Review*, Summer 2005, the author addresses much of the aforementioned issues. He proposes a remedy through the contract. Mr. Desai offers that those who can afford contractor services are limited to a select group: Government, NGOs and corporations. He stipulates rogue entities could hire companies that perform illicit activities. But if the larger groups, specifically the USG, refuses to deal with organizations that become involved in illegal activities, that

⁸⁹ DoD Instruction 3020.41, 15.

⁹⁰ DoD Instruction 3020.41, 15.

⁹¹ DoD Instruction 3020.41, 15.

could curb some activities. Being for-profit organizations, contractors seek larger monetary opportunities and “established legitimate concerns” to continue consideration in the future. Participation in illegitimate behavior, Mr. Desai argues, limits the business’s chance to be considered a company to represent the USG.⁹²

Mr. Desai continues, stating that the contracts “...routinely contain choice of law, jurisdiction, and warranties and representations clauses.”⁹³ He proposes that all contracts given by the USG contain wording pointing to US laws governing the contracts, companies, and employees, et al. By accepting the contract, the companies and their employees agree to U.S. jurisdiction regardless of the location of services. While much of this is covered in DoD 3020.41, Mr. Desai points to specific training issues. He advocates that the company would be required to provide Law of Armed Conflict, human rights, and any other applicable laws. This training would be required for all contract personnel, not just in theater CBSPs. But how would this be accomplished? Who would ensure that the training is accomplished to the prescribed standards?

Laura A. Dickinson offered a few possible solutions in her article “*Government for Hire: Privatizing foreign Affairs and the Problem of Accountability Under International Law*.”⁹⁴ Ms. Dickinson addresses that military contracts may contain the proper wording but if the oversight is unavailable then the contract is voided. “Oversight of military contracts may also be lax because of the sheer number and scope of the contracts and the staffing shortages in government offices charged with such oversight. The DoD IG study

⁹² Desai, *Have Your Cake And Eat It Too*, 12.

⁹³ Desai, *Have Your Cake And Eat It Too*, 12.

⁹⁴ Dickinson, *Government for Hire*, 20.

concluded that more than half of the Iraq contracts had not been adequately monitored.”⁹⁵

Mr. Desai addressed this issue in a similar manner. He argued that attorneys be “...placed with the pre-deployed and post-deployed group to carry out the contract...an independent, private attorney corps staffed by attorneys from groups such as Lawyers Without Borders, would more successfully provide true counsel to those on the ground and not be as susceptible to manipulation.”⁹⁶ Ms. Dickinson suggests that attorneys be utilized as well. But her approach differs, and offers a more realistic approach.

Although various agency IGs and contract officers have a nominal role overseeing many of the contracts, their ability to engage in meaningful monitoring would be increased through better-staffed and increased use of graduated penalties. For example, the government could, as it does in some domestic context (prisons), specify that when a contractor is not performing well under the contract, government monitoring can increase, and, if problems rise to a certain level, the government can actually take over or rescind the contract. Contracts could also provide for fines when contract employees engage in abuses.⁹⁷

Her ideas on oversight are more applicable but it would impact cost, which she acknowledges. “Of course, contractual accountability is not a panacea.... Also, the added costs of compliance and oversight may, in some circumstances, swallow the purported benefits of privatization in the first place.”⁹⁸ As stated earlier, the CBSP are a business whose primary objective is profit. Profit is not a concern of the military. Its purpose is effects with little consideration to costs. But Ms. Dickinson’s argument does hold merit. The issue at hand is who is going to accomplish contractual oversight. Those who have

⁹⁵ Dickinson, *Government for Hire*, 20.

⁹⁶ Desai, *Have Your Cake And Eat It Too*, 12-13.

⁹⁷ Dickinson, *Government for Hire*, 20-21.

⁹⁸ Dickinson, *Government for Hire*, 21.

the greatest knowledge of the contracting process are contracting officers, but this section of the military suffered tremendous reduction in force during the 1990s.

An Army report on contracting, referred to as the Gansler Commission Report, stated that the “...institutional Army have not adapted in order to enable responsive acquisitions and sustainment for expeditionary operations. Specifically: Financial Management, Civilian and military personnel, Contract and contract management, Training and education, and Doctrine, regulation, and processes.”⁹⁹ The report mentioned that there had been a “...seven-fold workload increase and greater complexity of contracting...” but “...only 56 percent of the military officers and 53 percent of the civilians in the contracting career field are certified for their current positions.”¹⁰⁰ The report also rendered that “...with there being almost as many contractor personnel in the Kuwait/Iraq/Afghanistan theater as there are U.S. military, the Operational Army does not yet recognize the impact of contracting and contractors in expeditionary operations and on mission success.”¹⁰¹ Additionally, the workforce has decreased between 50-60%, depending on the specific area, i.e., civilian, military, Army, Air Force, DoD, etc.¹⁰²

Showing how delicate, intricate and complex the legal issue is seen in the following excerpt from “*Betraying the Troops*” by Dina Rasnor and Robert Bauman.

But according to attorney Scott Horton, an adjunct professor of law at Columbia University, chairman of the International law Committee at the New York City Bar

⁹⁹ U.S. Army. Acquisitions. *Report of the “Commission on Army Acquisitions and Program Management in Expeditionary Operations”: Urgent Reform Required: Army Expeditionary Contracting.* (Washington D.C.: Department of the Army, October 31, 2007.) 1
Heretofore this report will be referred to as the Gansler Commission Report.

¹⁰⁰ Gansler Commission Report, 2.

¹⁰¹ Gansler Commission Report, 2.

¹⁰² Gansler Commission Report, 41, 51.

Association, and a member of Council on Foreign Relations, there is a constitutional question of prosecuting contractors under the UCMJ. He said, the “UCMJ always had provisions in it permitting the prosecution of what were historically called ‘camp followers,’ and today would be called military contractors. Back during the Vietnam War, this provision was held to apply only in times of ‘declared war,’ which effectively rendered it moot, since the US doesn’t declare war any more. Why did the court do this? Because if applied, this provision would face an immediate constitutional dilemma. That’s *Reid v. Covert*, 354 U.S. 1 (1975), holding that the 5th and 6th amendments protect U.S. citizens abroad, so that the 5th amendment right to a grand jury and the 6th amendment right to a jury trial (neither present in the UCMJ) preclude military prosecutions. With the limitation about ‘declared wars’ removed, the underlying questions of constitutionality remains.

In addition, Horton said, “Now congress attempted to deal with this problem by enacting the Military Extraterritorial Jurisdiction Act (MEJA) which does provide a long-arm for criminal prosecution of military contractors abroad. The problem in its essence is not absence of a statutory basis for prosecutions, but a failure of prosecutorial will. For instance, of the cases referred to the ED (Eastern District) VA (Virginia) for review and prosecution, not a single case has been commenced. DOJ (Department of Justice) is exercising discretion not to prosecute.... If a military prosecutor were to attempt to bring a case, he’d face the constitutional issue right up front, and it’s reasonably clear that the action would be a long shot. I don’t see such a case being brought.”

Horton suggested that the only way the UCMJ could be applied to contractors is if a contractor is also a reservist and is activated by the military, thus placing the contractor under the UCMJ as an active duty soldier for the purpose of prosecution.

Eugene R. Fidell, president of the National Institute of Military Justice, echoed Horton by saying “Ultimately, if this power is used, it will create a substantial issue that would likely reach the Supreme Court, and it will put odds with contemporary international standards.” Adding to the problem of prosecuting civilians in military courts, Fidell said there has been a history of civilian convictions in military courts being thrown out by U.S. Courts.

However, Horton felt that there may be reasons the

Supreme Court would be willing to overrule (or more likely distinguish) those cases today. Those reasons include the fact that military justice has trended toward a convergence with civilian criminal justice system norms and principles; the establishment of the Court of Appeals for the Armed Forces with discretionary appeals to the Supreme Court contractors on the battlefield are performing many duties which historically have been performed by soldiers in past wars; therefore contractors are taking the king's shilling, and so should be subject to the king's justice.¹⁰³

The above paragraph reveals the complications facing the U.S. by using CBSPs.

Mr. Horton points out the Constitutional issue are formidable. The U.S must determine how to interpret the law and utilize it. If it does not do this, the opportunities for CBSPs to run counter to U.S. policies, even within U.S. borders, is considerable.

¹⁰³ Rasnor, Dina & Bauman, Robert, *Betraying Our Troops: The Destructive Results of Privatizing War*. (New York: Palgrave McMillian, 2007), 233-234.

CHAPTER FOUR—COSTS

“Why are we paying these guys \$600 a day when we pay a sergeant \$88 a day?”

- U.S. Representative Henry Waxman, CA

The intent of this chapter was to establish a true cost comparison between the military personnel costs and the CBSP costs. In doing so, a plan to examine the military’s cost of taking someone off the street and training him or her to a specific level and then employing them in specialized tasks. Once that was established, build the same information of a CBSP contractor and compare that to the military’s costs. A planned spreadsheet showing a line-by-line analysis was envisioned. Acquiring this information became impossible. Several requests to obtain the cost information from the military were not acknowledged. Also, the CBSP companies are guarded on their costs and are often protected by contractual law from revealing said information. Nonetheless, some information was attained. Regarding the military costs, research revealed that the military charges other government entities a usage fee for military members being employed, i.e. a military member working for the State Department. The contract company costs were found through the recent House Oversight Committee investigation of Blackwater’s involvement in Iraq. Blackwater provided invoices that revealed what was charged to the government. These two revelations provided the basis for this chapter’s examination. The examination will reveal if the premise that CBSPs provide cost efficiency is true. Also, this chapter will look at the additional impacts of having CBSPs performing certain tasks versus maintaining those in the military.

All companies look to save money in order to raise their profit margins. Most accomplish this feat by cutting production costs. The Department of Defense, being one

of the world's largest companies, is no different. Since their product is not sold on the open market, the only way to save money is by cost cutting. Opportunities to do so are limited to programs, equipment items, or personnel. Based upon DoD's website, it is the largest employer in the nation with 5.3 million on the payroll. As the numbers indicate, the largest accounting item in the DoD budget line is personnel. Therefore, trying to save money through personnel decisions is not new.

The privatization of government functions is a decades-old phenomenon. Many attribute it to the policies of United Kingdom's former Prime Minister Margaret Thatcher. Her efforts are not the source of United States privatization. The source comes from a circular from OMB. That circular is A-76.

A-76 actually began in 1955. The Bureau of Budget issued Bulletin 55-4 states "...the federal government would "not start or carry on any commercial activity" that the private sector could do."¹⁰⁴ Several changes have transpired since that time. But throughout revisions the premise has remained: competition is good for the economy by improving productivity and mitigating costs. The USG diligently applied this approach during the Reagan presidency and continued through the current Bush administration.

In an attempt to cut costs, the USG decided to reduce the number of troops needed, a trend that started and continued through the early 21st century. The fall of the Berlin Wall and the ensuing collapse of the Soviet Union led to the perception that large state-based enemies no longer existed. The United States' threat from the Soviet communist aggression was gone. Therefore, the need for the military capabilities was removed as well. During the 1990s and into the new millennium, the United States relieved many

¹⁰⁴ U.S.Army, <http://www.imcom.army.mil/site/plans/compsourcing.asp> (accessed December 1, 2007).

troops from duty. While this brought significant savings it was not enough. Though it has relied on them before, the government opted to utilize contractors in a larger capacity to save money.

The main reason for using contractors is reducing costs. Private organizations are looking to impact the bottom line by cutting costs. The most effective way to do that of late is by outsourcing. The key is that the quality, while the same, the overall cost is less. The USG has joined the outsourcing practice. But the questions are many: a) is the cost actually lower, b) is the quality the same, and c) does the outsourcing of specific aspects impact the other items? This chapter will begin to answer these questions by performing a small costs-comparison based upon GAO reports. An in depth analysis is not performed because accounting methods performed by DoD make it almost impossible to dissect specific items from one arena to another. It largely is dependent on the “color of the money”, or from which account it comes. Lastly, this chapter examines the outsourcing impacts on the overall force. By outsourcing certain abilities and functions, the sum effect is detrimental.

COST ANALYSIS

As stated above, a full cost analysis is next to impossible without an extended period and a team of auditors. It is also made difficult by the unwillingness of the services to render the information. The author has tried on several occasions through many avenues to attain cost information. Each attempt was answered with a non-response.

Therefore, this chapter will conduct the analysis from the approach of daily costs. Though this is not all encompassing and much needs to be calculated, this research

attempts to explain what is included and what is not. The basis for the numbers come from GAO reports, Congressional Report Service, congressional testimony of contractors, and so on. Moreover, a full accounting for each activity by a service member or contractor is beyond the scope of this venture. One straightforward approach is to compare and contrast a PSD (Personal Security Detail) for State Department utilizing a contractor with that of a military team.

Ms. Jennifer K. Elsea, a legislative attorney, and Ms. Nina M. Serafino, a specialist in International Security Affairs, collaborated on the issue of private security contractors in Iraq for the Congressional Research Service Report for Congress. In their cost analysis, they state,

(w)hether the use of private contractors for such services [private security for reconstruction services] is cost effective is another question that cannot be answered definitively with current information. The Government Accountability Office (GAO), in a recent report on costs of operations and maintenance support services notes that appropriate information is lacking to make such a calculation for such services and that the analyses needed to make such a determination “can be expensive and time-consuming.¹⁰⁵

This truly sounds like the Government Accountability Office is taking the easy way out. If cost is such a great concern, the GAO must either take the time and energy to evaluate the costs, or it must develop a more effective manner in which to evaluate. Therefore, to believe that a paper of this scope and intent can uncover the Einsteinian accounting practice of the USG, if all the resources of the GAO cannot accomplish the task, would be naïve. However, to establish the argument, an attempt will be made, first, an

¹⁰⁵ Elsea, Jennifer K., and Serafino, Nina M., *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*. (Washington D.C.: Congressional Research Service, July 11, 2007), 5-6.

examination of the numbers.

Each fiscal year the Office of the Under Secretary of Defense (Comptroller) releases the Department of Defense Military Personnel Composite Standard Pay and Reimbursement Rates (See Appendix Three for in-depth explanation). This memorandum details the costs of “...military personnel for budget/management studies.”¹⁰⁶ And gives rates for both inside and outside DoD. It represents each service and includes Medicare-Eligible Retiree Health Care (MERHC), in-house charge, or medical health care costs when charged to other agencies. The table includes formulas to calculate daily and hourly rates. For the purposes of this argument the “Annual Rate Billable to other Federal Agencies” will be used. Training and equipping of those individuals, however, is not included.

Let’s examine a PSD for a State Department mission, using the backdrop of the current events in Iraq.¹⁰⁷ Ambassador Crocker has a meeting across town from the Green Zone in Baghdad. The trip from the base to the meeting location requires approximately 30 minutes driving time each way; the meeting lasts two hours; the Army’s security detail involves two-dozen personnel. The team consists of four officers, two captains, one major, and one Lt. Col. The remainder are enlisted personnel: two E-7s and nine each of E-6s and E5s. Table 4.1 demonstrates the costs associated with this team.

Table 4.1

Rank	Annual Rate	Daily rate factor (Annual Rate x .00439)	Cost/person	Number of personnel	Total costs
O-5	151,367	664.50	664.50	1	664.50

¹⁰⁶ Fiscal Year (FY) 2006 Department of Defense (DoD) Military Personnel Composite Standard Pay and Reimbursement Rates, Sep 9, 2005

¹⁰⁷ The US Army no longer performs this mission. It surrendered this mission in the 1990s.

O-4	133,808	587.42	587.42	1	587.42
O-3	108,953	478.30	478.30	2	956.60
E-7	81,607	358.25	358.25	2	716.50
E-6	71,753	315.00	315.00	9	2835.00
E-5	59,311	260.37	260.37	9	2343.38
				24	\$103.40

The table represents a snapshot view of that day and does not include any necessary equipment, transportation, training, medical, retirement, dependent or other costs.

Department of State has been outsourcing those aforementioned services to contractors. The team typically consists of six individuals assigned with protection, four drivers, and one to two supervisors not co-located with the team. Table 4.2 numbers are from the evidence supplied to the House Oversight Committee during the Blackwater testimony.

Table 4.2

Personnel (Activities)	Cost Per Day	Number of Personnel	Total Costs
Guard	\$600	6	\$3600
Driver	\$600	4	\$2400
Supervisor	\$1200	2	\$2400
		12	\$8400

Supplementing the cost, the military brings more firepower since the team consists of twice as many armed individuals. But one must remember, that in the long run the military option brings higher costs due to the constant benefits of the individuals staying in the military until retirement. The contractor option, of course, lacks the long-term commitment (retirement benefits), daily pay (only paid when they are working), and medical if injured on the job. If the military individual becomes injured on duty, the individual is under the care of the military and/or the Veteran's Administration until well or for the duration of his or her life.

Other considerations often omitted from this discussion include where the employees of contractors receive their training, and the versatility that military members bring to the fight. The majority of contractors are former military members, especially those in the private security realm. The military spends upwards of over a million dollars in training for certain careers. Those are sunken costs that contractors rarely face. Instead, the primary recruits are seasoned military, and in some cases police members.

Regarding sunken costs, the military is not limited to having that person do that one activity. If that individual chooses to cross-train to another position or is medically disqualified from performing those duties, they can be trained to perform another task. In doing so, they bring the experience of how their actions affect the overall battle plan.

Moreover, the service member brings additional capabilities to bear because of the legal status afforded them through such agreements as the Geneva Convention, UCMJ, and UN treaties, etc. The daily publication of *Investor's Business Daily*, on December 6, 2007 mentioned an example of this. The article "Leaders and Success" told the story of USAF SSgt. Jessica Wilkes, a combat videographer who provided video documentation from the battlefield. She served as an embed with the infantry working in the Diyala province. In spite of her primary responsibility to film house-to-house raids, weapons searches, combat missions and humanitarian works, she carried a M-16 not only to defend herself but also those whose story she was documenting. Knowing the hazards, she trained to become an asset, rather than a liability, to those units with which she traveled. When her unit came under attack, she would switch from filming to firing. "It's pretty clear when you need to do that. The shot is important, getting the video, but there were times where, if it was between needing to fire back or to get the shot, I would

fire back,” Wilkes said.¹⁰⁸ Her story shows that while she is trained as a videographer, she brings added combat power. Yet the argument is that contractors bring an efficiency and cost effectiveness. Kellogg, Brown and Root (KBR) uses this argument repeatedly, but is that the case?

KBR, the main logistics contractor for the US Army via Logistics Civil Augmentation Program (LOGCAP) III, states that they are better able to respond to the Army’s needs than the Army is. But if they are unable to defend themselves, or if they require armed escorts, in the form of an Army team or hired guards, in a combat zone, how is that a value-added consequence? One cannot argue that KBR can respond more efficiently to changing needs but in combat, efficiency is not the issue. Effectiveness brought to bear on the enemy’s actions; securing the civilian populace and protecting your own interests are the issue. In the previous story of SSgt Wilkes, if her tasks had been contracted out to a news service, those individuals would require security. The embedded news service group would require additional attention from the combat team, thus possibly diverting the team’s attention from the fight. And while the news group would likely produce a higher quality video than SSgt Wilkes, they would not enhance the combat team’s firepower.

Flexibility is another key issue discussed within the realm of contractors. As mentioned earlier, KBR prides itself on the ability to quickly adapt to the Army’s request. But with each adjustment, the Army incurs additional cost through change orders. Depending on the task’s scope and required response time, the costs could be at a premium. Obviously the Army would not have as high of cost when the conditions dictate a change if these were organic. But that is not the only question of flexibility,

¹⁰⁸ Seitz, Patrick, “Leaders and Success”, *Investors Business Daily*, December 6, 2007

Ms. Elsea and Ms. Serafino also bring into question contractors' flexibility.

Although some have argued that private contractors can be deployed more quickly than military forces, others have argued that military commanders can respond more quickly to changing situations when military force rather than contractors are used. Commanders do not exercise "command and control" over private contractors, nor do they have the authority to amend contracts in the midst of an operation to reallocate contract employees to perform necessary tasks that fall outside the terms of the contract.¹⁰⁹

Many also argue that the cost of troops—pay, benefits, sustainment, etc.—is too high and that the logistics is outside the core competency of the military. Proponents argue that the contractors not only do it more cheaply but also with fewer people. The current levels in Iraq may indicate that is not the case, however. In his book *Fiasco*, Thomas Ricks writes about the planning involved in Phase IV operations in Iraq. In those discussions, reconstruction estimates had troop levels "...around 470,000."¹¹⁰ Michael Gordon's book *Cobra II* reported the invasion plan estimates were 385,000, a downward revision of General Anthony Zinni's, former CENTCOM commander, Desert Crossing 400,000 number.¹¹¹ In fact, according to the lead article in the December 11, 2007 *Investor's Business Daily*, U.S. troops and contractors together equal 340,000 personnel.¹¹² And some estimates have the numbers higher, closer to 370,000, pushing it closer to General Zinni's planned numbers.

¹⁰⁹ Elsea, and Serafino, *Private Security Contractors in Iraq*, 26-27.

¹¹⁰ Ricks, Thomas E., *Fiasco: The American Military Adventure in Iraq*, (New York: The Penguin Press, 2006), 79.

¹¹¹ Gordon, Michael R. and General Bernard E. Trainor, *COBRA II: The Inside Story of the Invasion and Occupation of Iraq*, (New York: Pantheon Books, 2006), p. 28.

¹¹² Graham, Jed, *Gov't Lifts Contract Work Force To Save Money, Add Flexibility*, *Investor's Business Daily*, December 11, 2007

The issue of cost overruns is still a concern. Contract overruns, or overcharging for services/items, were noted in 2003-2004. Halliburton returned \$6.3 million after two of its employees had taken kickbacks included in overcharged items. A GAO report revealed \$700 million discrepancy between certified and submitted costs from Halliburton.¹¹³ The Defense Contracting Audit Agency (DCAA) has submitted similar reports with totals into the billions. Some of this results from the US Army's reduction in the contracting officials. One area of the realized 'peace dividend' of the 1990s was the contracting management offices. Those same offices, however, became some of the busiest because contractor usage increases. Rasor and Bauman noted the process in their book:

Administrative contracting and LOGCAP personnel on the ground in Iraq have been too overwhelmed by their regular duties to provide any type of performance monitoring of the contractor. Their time on the job has often been taken up with putting out unexpected management fires and fighting with contractor managers. In the United States, the Defense Department often assigns complete staffs of administrators to work on site at large contractors to manage contracts and look after the interests of the government. In Iraq, most military sites had only one or two contract managers and one LOGCAP official to handle the load.¹¹⁴

The results, according to GAO comptroller David Walker in his 2006 testimony to the House Appropriations Subcommittee, demonstrate that the overworked acquisitions staff allows the contracts to be mismanaged.¹¹⁵ Mismanagement can only be reduced

¹¹³ Rasor & Bauman, *Betraying Our Troops*, 179.

¹¹⁴ Rasor & Bauman, *Betraying Our Troops*, 236.

¹¹⁵ Belasco, Amy, *The Cost of Iraq, Afghanistan and Other Global War on Terror Operations since 9/11*. (Washington D.C.: Congressional Research Service, November 9, 2007), 36.

through proper oversight.

CHAPTER FIVE—OVERSIGHT

“(T)he military commander needs competent professional advice in the exercise of expeditionary contracting mission. Today, however, combatant commanders (COCOMs) are not trained to appreciate the key role of contracting, nor to understand a COCOM’s role in contracting (involvement in lawful exceptions to competition requirements, other FAR [Federal Acquisition Regulation] exceptions, PARC [Principal Assistants Responsible for Contracting] dollar value authority, and so forth.)”¹¹⁶

-Gansler Commission Report

A neighborhood without police oversight can run amuck. Therefore, law enforcement presence alone typically brings some semblance of order. The same logic can be applied to contracting. Without oversight, contractors can commit fraud, waste and abuse to the system through faulty charges of services, non-performance, etc. Contractual oversight limits these issues. This chapter will present recent findings in the area of oversight, specifically on the personnel aspects.

October 31, 2007, the independent commission study, called the Gansler commission after the chairman Dr. Jacques S. Gansler, on expeditionary operations contracting was released. The Secretary of the Army directed the study. The commission was charged to “...review the lessons learned in recent operations and provide forward-looking recommendations to ensure that future military operations achieve greater effectiveness, efficiency, and transparency.”¹¹⁷ The commission found while the “...‘Operational Army’ is expeditionary and on a war footing...”¹¹⁸, it, nor the “Institutional Army”, “... fully recognize the impact of contractor in expeditionary

¹¹⁶ Gansler Commission Report, 3 and 21.

¹¹⁷ Gansler Commission Report, 1.

¹¹⁸ Gansler Commission Report, 1.

operations...on mission success...(and) have not adapted....”¹¹⁹ As stated earlier in this writing, the study determined that five specific items the Institutional Army needed to address. Those items were: “financial management, civilian and military personnel, contracting and contract management, training and education, and doctrine, regulations, and processes.”¹²⁰

The study concluded the Army’s contracting workload had increased 600 percent and become more complex.¹²¹ Dollar values saw a 331 percent increase within the period.¹²² Yet the Army’s contracting workforce had not only become smaller, from 10,000 in 1990 to 5,500 since 1996, but less experienced as well.¹²³ These numbers alone are staggering but the significance of the numbers is what is important. The number’s importance is seen in contractor’s performance. The Commission reported, “...after the contract is awarded, there are no resources trained to monitor and ensure that the contractor is performing and providing the services needed by the warfighter.” The report further stated:

The inability to monitor contractor performance and enforce contract is a critical problem in an expeditionary environment. After the contract is awarded, there are no resources trained to monitor and ensure that the contractor is performing and providing the services needed by the warfighter. The Commission heard of the difficulties associated with knowing whether a contractor had performed the work at all. When the critical need is to get

¹¹⁹ Gansler Commission Report, 1.

¹²⁰ Gansler Commission Report, 1.

¹²¹ Gansler Commission Report, 4.

¹²² Gansler Commission Report, 30

¹²³ Gansler Commission Report, 30. The average experience level is 3.8 years, down from over 5 years (p. 17).

a power station running, and there are no resources to monitor contractor performance, only the contractor knows whether the completed work is being accomplished.¹²⁴

The Army's lack of contract adaptability from the Cold War weapons-based system to the expeditionary system has led to the Army "...sending a skeleton contracting force into theater without the tools or resources necessary to adequately support our warfighters."¹²⁵ In fact, the U.S. Army reported that it had "...only 279 Officers and 62 Enlisted members specializing in contracting...", which is only three percent of the contracting workforce.¹²⁶ Theater—Iraq and Afghanistan—requires that the Army supply "171 contracting officers," which the Army has only meets 80 percent of the requirement.¹²⁷ This is astounding when one considers that the Army is "DoD's 'Executive Agent' in Iraq and Afghanistan."¹²⁸ That means the Army is:

The Head of a DoD Component to whom the Secretary of Defense or the Deputy Secretary of Defense has assigned specific responsibilities, functions, and authorities to provide defined levels of support for operational missions, or administrative or other designated activities that involve two or more of the DoD Components.¹²⁹

Yet the Army is "...unable to fill military or civilian contracting billets, in either quantity or qualification."¹³⁰ In fact "...only 38 percent of the total Army Acquisition/Contracting

¹²⁴ Gansler Commission Report, 27.

¹²⁵ Gansler Commission Report, 27.

¹²⁶ Gansler Commission Report, 24.

¹²⁷ Gansler Commission Report, 34.

¹²⁸ Gansler Commission Report, 4.

¹²⁹ DoD Directive Number 5101.1, *DoD Executive Agent*, (Washington D.C.: Department of Defense, September 3, 2002), 2.

¹³⁰ Gansler Commission Report, 4.

Workforce in-theater are certified for the position held; and, overall, Army contracting people mostly are not certified for the position occupied.”¹³¹ Not only are the individuals not qualified, the organizational parts are disorganized.

Contracting supervision is not centralized in one command. Responsibilities have been divided among multiple commands with none having the task “...to synchronize all aspects of contracting below the Army Secretariat level.”¹³² This leads to confusion at all levels, inside and outside the Army. “(C)ommanders and contractors have to deal with multiple heads of contracting activities...and PARCs. These multiple interactions can result in varying policy interpretations and poor operations.”¹³³ The aforementioned DoD oversight of State Department’s contract with Blackwater is an example. Normally, the in-theater chain of command flows from the COCOM to the Joint Task Force Commander to the component, which in this case would be the Joint Contracting Command Iraq/Afghanistan (JCC-I/A). Conversely, the authority for contracting is different. Authority goes “...from the Head of the Agency to the Senior Acquisition Executive. There are three Army contracting chains of command in Iraq....”¹³⁴ As most realize, a lack of unity of command will lead to a lack of unity of effort. And in the realm of contracting, it leads to additional costs.

¹³¹ Gansler Commission Report, 28.

¹³² Gansler Commission Report, 44.

¹³³ Gansler Commission Report, 44.

¹³⁴ Gansler Commission Report, 45.

CHAPTER SIX—IMPACTS

The impact is profound and has lasting repercussions well beyond the contracting effects. Quality of life, improved logistics, and quicker reaction to the milieu are all part of the so-called selling points. Drawbacks are often noted as: security for contractors in areas of conflict, civilians doing the same jobs for a much higher price, as well as who has the authority, the contracting organization or the contractor.

Regarding the positive impacts, most military members tout large improvement in quality of life issues. Doug Brooks, president of the industry/lobbying group International Peace Operations Association, recently said the industry was doing so well that “(t)he fact that troops are going to Iraq right now and actually, in 120-degree weather, putting on weight, kind of shows we are doing too much support.”¹³⁵ Is weight gain a reliable indicator of efficiency or success? The intended goal in using CBSP is to reduce the cost to the government, and therefore the taxpayers, as well as improving the logistical requirements of the troops. But this cannot be touted if the government does not do an apple-to-apple comparison. Also, utilizing civilians brings additional housing and security costs that the military does not always receive. For example, reports of the Green Zone amenities border on plush. By taking more civilians into the battlespace, higher-level amenities are required which adds to costs. Civilians’ expectations on quality of life issues are oriented toward ‘softer’ issues than most military personnel. By combining the civilians and the troops, the troops gain the halo effects that come with the civilians yet the costs go up because of the civilian requirements.

Another issue that is routinely discussed among military leaders is the loss of

¹³⁵ Singer, P.W., “Counterproductive”, *Armed Forces Journal*, (November, 2007), 37.

military personnel to contractors' organization. The impact is growing as the military continues to become more technically oriented and less Industrial Age based.¹³⁶ Through this transformation, the military must more quickly adapt to the technical environment by purchasing the services and support on the open market. But once highly technical components are instituted into military structure, the demand for more "consultants" becomes greater. The military personnel are recruited to work as contractors doing the same positions, but in most case at least twice as much in the way of pay and benefits. This is truly nothing new.

Military personnel have always been in demand in the work force. Their dedication, experiences, discipline and team-oriented approach, as well as other attributes, make them highly coveted. For years, pilots have been sought by the airline industry because of their broad level of training. This trend is now growing into all ranks and positions. Since transitioning into an all-volunteer force, the military has forced itself to compete for the top candidates in the job force.

Competing in the free-agent job market adds to the challenges of recruiting and maintaining quality personnel. The US job market transitioned to the free agency based market in the 1990s, and in doing so, many people jumped from one company to another for better pay and benefits. The military is not immune to this phenomenon. Now, it too is moving to a market-based system for services and is, ironically, bringing recruitment challenges upon itself. It finds itself in benefits wars in order to retain quality personnel. Contractors receive better remuneration than military personnel while doing the same job. Some contractors may work with their former units and those with whom they worked

¹³⁶ Brigadier General Karl Horst, interview by the author, Norfolk, VA, January, 2008.

with in the military. “Word of mouth” begins to take a toll as the contractor personnel talk to the their friends about their current lifestyle improvements resultant from transitioning to the civilian workforce.

CHAPTER SEVEN—RECOMMENDATIONS

The days of the military as the sole government representative in the battlespace appear finished. The USG move toward a whole of government approach, as seen in the new Africa Command (AFRICOM) model, is to take a preemptive approach at conflict. In doing so, it is utilizing the other entities of the interagency, i.e., Departments of State, Commerce, Agriculture, Defense as well as others. Most of those departments are unable to provide the required personnel numbers to resolve the scale of existing problems. The DoD brings mass capacity—in the forms of people and items—and money. But as the USG enters the era of baby boomer retirements and its resulting impacts on government spending, even DoD is seeing a decrease in its mass, which is the reason for outsourcing. Therefore, this author believes that not only is the use of contractors here to stay, it is going to grow to the point that it will cause the military of the future to be more contractors (civilians), possibly including trigger pullers, than uniformed personnel. Because of that fact, the USG must address their use in these areas: **personnel/training, planning, categorization and oversight.**

The recommendations start with people; which start with reversing reduction trends from the 1990's. Numbers of members who are versed in contracting regulations must be increased. If the U.S. continues to rely so heavily on contracting to supply operations, having personnel who are highly knowledgeable in contract management is a must. Much of the infrastructure exists, yet the number of personnel is lacking. DoD must bolster the personnel in the contracting/acquisitions divisions. The population needs contracting professionals not other professionals performing the task as an additional

duty.¹³⁷ Contracting personnel should exist at all levels: Departmental to squadron/brigade. The department needs to have enough to accompany deployed units. The combination of expeditionary forces and contractor dependence requires contracting personnel be expeditionary as well.

The workforce's training requires updating in all contract management aspects, "from soup to nuts." The Cold War, weapons-based approach does not work in the current high-paced environment.¹³⁸ Training should include FARs, contract requirements for the customer, contract design, execution and closure. Additionally, the training must not be on the job training. Requirement should be met in conjunction with unit exercises or contract "simulators". Doing so allows contracting staffs to gain experience in a "safe" environment where mistakes will not have the impact of a combat environment. Personnel would attain a specific level of expertise before be deployable. This requirement ensures the organization receives proper support at the best price.

Training should also be accomplished in schools, such as the one the author is attending. With growing reliance on contracting, DoD must incorporate useful training into the mid- and senior-level leadership officer, and senior NCO schools. A token three-hour class that has the contractors giving a sales pitch of their services is not proper preparation in contract issues. Having the course without any DoD acquisition personnel leading the discussion is simply negligent behavior in both the near- and long-term. Schools provide the opportunity to expose future leaders to the demands that they will

¹³⁷ Gansler Commission Report, 23.

¹³⁸ Gansler Commission Report, 14. The report examines the difference between purchasing a new tank for the army versus supplying food to the troops in Iraq and Afghanistan. The tank takes years and has a team working on the variety of aspects that change the end product along the way. Providing food to troops in combat conditions differs dramatically because of several factors: pace, timing, and location to name a few.

face. By not have an expert facilitate the class reveals DoD's commitment to resolving current contract deficiencies.

Another important aspect to make certain proper support is received is found in suitable planning. If DoD is going to continue to rely on contractors, it must bring them into the planning process. Planning 'on the fly' is a poor business practice; and when it does so, the USG fails to receive the best price. DoD, therefore, must begin early in the plan to determine what will be outsourced and who will provide the services. Planning staffs should incorporate a contracting planning cell to determine what is contracted and establish the proper command authority before contracts are written, much less before contractor arrive in the field. Then, DoD and the contractor must determine plan timelines, resources, budgets, and other requirements. This process must limit the number of subcontractors. This means that the company that has the contract with DoD must have the capacity to fulfill the contract, not turn around and sub it out to a third or even fourth party. If this is not accomplished, the cost savings for the customer—DoD and ultimately the U.S. taxpayer—is moot. The reason this is moot is due to the required oversight of additional contracts and contractors. Also, each company adds an additional margin in order to protect their financial interests, mainly profits.

It is also important to categorize the service providers. Whether logistics, security, or combat-support, DoD must properly classify contractors. Classification will aid in the planning process: who, what, when and how. Coordination is paramount in the battlefield tactical situations, but it also impacts strategic objectives that are stated in documents such as the NSS objectives. Through the proper coordination of such efforts from the onset, mission success is more likely.

Classification not only aids planning but is needed for legal reasons. Having established these practices, DoD and more importantly the USG, must take the necessary steps to enforce the existing laws and develop those that may be needed. As proven previously, many of the current contractors fall on the fringes of U.S. law. While some laws could be utilized against both the individual contractor and the entity for which he works, e.g., DynCorp, KBR, Blackwater, et al., the USG must set clear legal precedents. The contracting companies must bear some of the burden for its employees' behavior. The best way to accomplish this is to target their bottom lines. If the for-profit company stands to lose monies as a result of their employees' behavior, then they will have more incentive to ensure their employees perform according to certain standards.

It is also imperative to establish legal authority. But legal authority requires oversight. It is not acceptable for the State Department to grant DoD oversight of companies working for it. The State Department bears responsibility to investigate any non-military US citizens' illegal actions overseas regarding the contractors it hires. In most instances, when a US citizen violates a law abroad, the U.S. embassy becomes involved. And in most cases, the country teams staff has legal representation in the form of FBI personnel. For non-DoD contractors, these country team members should be responsible for conducting the investigations. An increase in their presence would either be required or stand-by teams must be created. The recent agreement between the State Department and DoD causes more confusion on this matter.

Laws can also be enforced through contractual requirements. DoD must become more cognizant of the finer details of each contract. In doing so, contractor accountability is established. Accountability would reduce many, but not all, of the

current issues that are facing DoD. Additionally, they must ensure that the contractors are not prone to ceasing operations. Contractors must be held to the same performance standards as their military counterparts. Leverage through this accountability would rest both with DoD to ensure that not only is the mission carried out according to the objectives but any disregarding of the contract would carry a strong penalty, either financial, legal or both, to mutually the individual and the company.

Legal boundaries and precedents are futile without proper oversight. Aforementioned contracting/acquisition personnel increases are required. Members must be expeditionary in nature, just as their warfighting counterparts, to provide oversight of CBSPs. But that is only part of the oversight. Oversight is needed not only in contract management but legal and inspection as well. Therefore, contract teams consisting of the three representatives would create necessary field oversight. (See Appendix Four.) These teams should consist of legal, acquisition and inspection personnel. The author is stipulating the team members should be military so the team could be deployed. This group would oversee the contractors' actions and regulate as necessary. Teams would be assigned to the battalion or squadron levels. Additionally, the lead unit would be part of the COCOM and/or JTF staff in the AOR. Inspections would be both scheduled and random to ensure contractors are not preparing for just the upcoming cycle.

Team members must be properly educated. Legal oversight members, of course, should be JAG equivalents. The acquisition component members should have an MBA or equivalent level of education. Typically, military members are not well versed in civilian business matters. Therefore, education with a strong business background is needed. The emphasis needs to be on many aspects of business: cost analysis, contract

development/negotiations/enforcement, process development, and Six Sigma¹³⁹ certifications. Acquisition members must be well versed in other current best practices. Additional oversight would be from the Inspector General's divisions who are versed in military resolutions. Many of these teams could be positioned within the Guard and Reserve forces. Many Guard and Reserve members have extensive skills necessary to fulfill team requirements. Moreover, their skills are not constantly in demand. During surge times of conflict/war, they would be mobilized to augment the active duty teams. Otherwise, these teams would remain in their civilian positions honing their skills.

Obviously, team building requires development. Many members could be recruited from current structures within DoD Acquisitions. But in order for them to be utilized properly, many would need to be retrained in the areas previously mentioned. DoD must add accountability to the team members as well. The lead oversight team would be responsible for oversight of the regional lead teams, those on the COCOM's staffs.

Accounting is a strong requirement. It is really difficult to determine whether outsourcing is cheaper. It is easy to say that in the long term it is but until a cost analysis is performed, that statement is one of speculation. Once determined to be most cost effective, the business members and teams must handle and oversee all contracts. Those overseeing the contracts should be the ones determining if the contractors are performing their required actions in a manner that increasing the effectiveness of their employers, i.e., the unit in the field.

Team members would be high demand in the civilian world. They would be

¹³⁹ Six-Sigma is a management methodology created by Motorola in the 1980's. Utilizing statistics, it is a data-driven manner to reduce, and hopefully eliminate, defects. It focuses on understanding and managing customer requirements. At the heart is the DMAIC model: Define opportunity, Measure performance, Analyze opportunity, Improve performance and Control Performance.

strongly recruited by contracting companies, just as senior officers are now. The military would need to establish incentives in the form of bonuses to entice members to stay in the military. Additionally, the military should consider non-compete clauses for a period of time after the individual ceases their military service. If they were liable for legal issues, then a time of military service in the Guard or Reserve forces would be required in place of clauses.

CHAPTER EIGHT—CONCLUSION

The stated purpose of this paper was that the United States is utilizing Private Military Companies (PMCs) more often in order to increase cost savings and efficiency; yet PMCs undermine U.S. security, are wrought with questionable legal practices, and fail to deliver savings and efficiency which means that PMCs will reduce US strategic capabilities. Yet, the U.S is continuing to rely on contractors. In fact they are building the reliance on contracted work.

History implies that those who go to battle for money are not the best choice. Motivations are for monetary, and when profit ceases to exist, those individuals/companies move on. Additionally, those who employ such companies are more prone to get involved in battles because a nation that risks its own blood and treasure is more hesitant to get involved and more dedicated once it crosses the line into battle.

This author has found that the use of CBSPs is wrought with questionable legal practices and takes advantage of legal loopholes. Cost-savings are at best difficult to establish with the accounting practices utilized by DoD. Additionally, contractors are not required to reveal their cost/prices due to legal issues regarding contracting issues.

Therefore, this paper was unable to examine how utilizing CBSPs is most cost effective.

USG continued reliance on contractors will decrease its standing within the world stage. It will dim that shining city on a hill, which President Reagan spoke repeatedly. The United States is the nation that many looked to as the one that offered hope and a chance. The USG must determine what it is going to do regarding funding and updating the Defense Department. Tough decisions stand before the executive and legislative

branches. If those branches do not address such issues diligently, it is this author's opinion based upon the research, this reliance will have detrimental effects in the near and long term.

APPENDIX ONE

J 005A
H

Period of Performance		Period of Performance 6/1/04 - 6/10/05							
Contract S-AQMPD-04-D-0061		Contractor: Blackwater USA							
CLIN	Sub-CLIN	Description	# of Positions	Quantity Estimate	Unit/ Month	Fixed Unit Price	Extended	Subtotal	Discount if Applicable
PRS									
0001	a.	Detail Leader	4	971	Days	1,315.09	\$ 1,276,948.13		
	b.	Deput Detail Leader	4	631	Days	1,302.40	\$ 821,812.27		
	c.	Shift Leader	20	4,649	Days	1,221.62	\$ 5,986,336.05		
	d.	Protective Security Specialist	244	54,466	Days	1,221.62	\$ 65,536,954.60	1,047.11	
	e.	PSS/Operations Chief	2	328	Days	1,221.62	\$ 431,348.08		
	f.	Explosive Detection Dog (EDD) Handler	8	1,789	Days	1,484.02	\$ 2,654,906.91		
	g.	EDD/Kennel Master	1	140	Days	1,532.04	\$ 214,486.22		
	h.	PSS/Firemans Instructor (OCONUS)	2	275	Days	1,287.66	\$ 354,106.78		
	i.	PSS/EMT /Special Forces Medic	19	4,435	Days	1,281.38	\$ 5,682,941.31		
	j.	PSS/Designated Defensive Marksman	8	1,106	Days	1,332.99	\$ 1,474,292.20		
	k.	Other TDY as designated by the RSO					\$ 30,000.00	\$ 85,464,132.54	
				312					
Management									
0002	a.	Project Manager	1	300	Days	1,456.30	\$ 436,890.55		
	b.	Deputy Project Manager	1	220	Days	1,438.56	\$ 316,484.20	\$ 753,374.75	
				2					
Aviation Support									
0003	a.	Aviation Project Manager	1	253	Days	1,032.71	\$ 261,275.64		
	b.	Pilot, MD-530-E	4	1,012	Days	1,000.44	\$ 1,012,443.12		
	c.	Co-Pilot, MD-530-E	4	1,012	Days	968.17	\$ 979,783.67		
	d.	Door Gunner/PSS, MD-530-E	6	1,518	Days	1,047.11	\$ 1,589,506.91		
	e.	Lead Aircraft Mechanic, MD-530-E	1	253	Days	742.26	\$ 187,791.87		
	f.	Aircraft Mechanic, MD-530-E	6	1,518	Days	709.99	\$ 1,077,762.04	\$ 5,108,563.25	
				22					
Equipment Costs: MD-530-E									
	e.	Aircraft	4	253	Days	3,555.94	\$ 3,598,615.27		
	f.	Flight Hours		3,659	Fly Hrs	420.18	\$ 1,537,424.57	\$ 5,136,039.84	
Other Costs									
	g.	Mobility Fees (Hull Insurance without War Risk)						\$ 361,666.81	
	h.	Mobility Fees (Shipment of additional MD-530 air)						\$ 225,000.00	
	i.	Demobilization fees (4 aircraft to the US)						\$ 375,000.00	\$ 961,666.81
PRS Support									
0004		Admin and Law Enforcement Security Specialist /A1 C01							



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Page 1 of 24
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ORDER DATE	SALES REPRESENTATIVE	TERMS	DELIVERY TERMS	SHIP VIA	CUSTOMER PURCHASE ORDER		
02/13/06		NET 30			S-AQMPD-04-D-0061		
LINE	ITEM/DESCRIPTION	REV	DUE DATE	U/M	INVOICE QUANTITY	NET UNIT PRICE	EXTENDED PRICE
1	BSCSO Clin 0001a Detail Leader SO Line: 1 January 2006			EA	128.0000	\$1,315.0900	\$168,331.52
2	BSCSO Clin 0001b Deputy Detail Leader SO Line: 2 January 2006			EA	79.0000	\$1,302.4000	\$102,889.60
3	BSCSO Clin 0001c Shift Leader SO Line: 3 January 2006			EA	410.0000	\$1,287.6600	\$527,940.60
4	BSCSO Clin 0001d PSS SO Line: 4 January 2006			EA	3,450.0000	\$1,221.6200	\$4,214,589.00
5	BSCSO Clin 0001e PSS/OPS Chief			EA	10.0000	\$1,315.0900	\$13,150.90

APPENDIX TWO

§ 121.1 -- General. The United States munitions list.

(a) The following articles, services and related technical data are designated as defense articles and defense services pursuant to sections 38 and 47(7) of the Arms Export Control Act (22 U.S.C. 2778 and 2794(7)). Changes in designations will be published in the Federal Register. Information and clarifications on whether specific items are defense articles and services under this subchapter may appear periodically in the Defense Trade News published by the Center for Defense Trade.

(b) Significant military equipment: An asterisk precedes certain defense articles in the following list. The asterisk means that the article is deemed to be "significant military equipment" to the extent specified in § 120.19. The asterisk is placed as a convenience to help identify such articles.

(c) Certain items in the following list are placed in brackets. The brackets mean that the item is (1) scheduled to be moved to the licensing jurisdiction of the Department of Commerce upon establishment of a foreign policy control or (2) in the case of spacecraft and related equipment, the item is under review by an interagency space technical working group. The interagency review will result in a recommendation as to whether an item should be moved to the jurisdiction of the Department of Commerce or to USML category XV which was established for this purpose.

(d) Missile Technology Control Regime Annex (MTCR). Certain defense articles and services are identified in § 121.16 as being on the list of MTCR Annex items on the United States Munitions List. These are articles as specified in § 120.29 of this subchapter and appear on the list at § 121.16.

Category I-Firearms

*(a) Nonautomatic, semi-automatic and fully automatic firearms to caliber .50 inclusive, and all components and parts for such firearms. (See § 121.9 and §§ 123.16-123.19 of this subchapter.)

(b) Riflescopes manufactured to military specifications, and specifically designed or modified components therefor; firearm silencers and suppressors, including flash suppressors.

*(c) Insurgency-counterinsurgency type firearms or other weapons having a special military application (e.g. close assault weapons systems) regardless of caliber and all components and parts therefor.

(d) Technical data (as defined in § 120.21 of this subchapter) and defense services (as defined in § 120.8 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (c) of this category. (See § 125.4 of this subchapter for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

Category II-Artillery Projectors

*(a) Guns over caliber .50, howitzers, mortars, and recoilless rifles.

*(b) Military flamethrowers and projectors.

(c) Components, parts, accessories and attachments for the articles in paragraphs (a) and (b) of this category, including but not limited to mounts and carriages for these articles.

(d) Technical data (as defined in 120.21 of this subchapter) and defense services (as defined in § 120.8 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (c) of this category. (See § 125.4 of this subchapter for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

Category III-Ammunition

*(a) Ammunition for the arms in Categories I and II of this section. (See § 121.6.)

(b) Components, parts, accessories, and attachments for articles in paragraph (a) of this category, including but not limited to cartridge cases, powder bags, bullets, jackets, cores, shells (excluding shotgun shells), projectiles, boosters, fuzes and components therefor, primers, and other detonating devices for such ammunition. (See § 121.6.)

(c) Ammunition belting and linking machines.

*(d) Ammunition manufacturing machines and ammunition loading machines (except handloading ones).

(e) Technical data (as defined in § 120.21 of this subchapter) and defense services (as defined in § 120.8 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (d) of this category. (See § 125.4 of this subchapter for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

Category IV-Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines

*(a) Rockets (including but not limited to meteorological and other sounding rockets), bombs, grenades, torpedoes, depth charges, land and naval mines, as well as launchers for such defense articles, and demolition blocks and blasting caps. (See § 121.11.)

*(b) Launch vehicles and missile and anti-missile systems including but not limited to guided, tactical and strategic missiles, launchers, and systems.

(c) Apparatus, devices, and materials for the handling, control, activation, monitoring, detection, protection, discharge, or detonation of the articles in paragraphs (a) and (b) of this category. (See § 121.5.)

*(d) Missile and space launch vehicle powerplants.

*(e) Military explosive excavating devices.

*(f) Ablative materials fabricated or semi-fabricated from advanced composites (e.g., silica, graphite, carbon, carbon/carbon, and boron filaments) for the articles in this category that are derived directly from or specifically developed or modified for defense articles.

*(g) Non/nuclear warheads for rockets and guided missiles.

(h) All specifically designed or modified components, parts, accessories, attachments, and associated equipment for the articles in this category.

(i) Technical data (as defined in § 120.21 of this subchapter) and defense services (as defined in § 120.8 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (h) of this category. (See § 125.4 of this subchapter for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

APPENDIX THREE

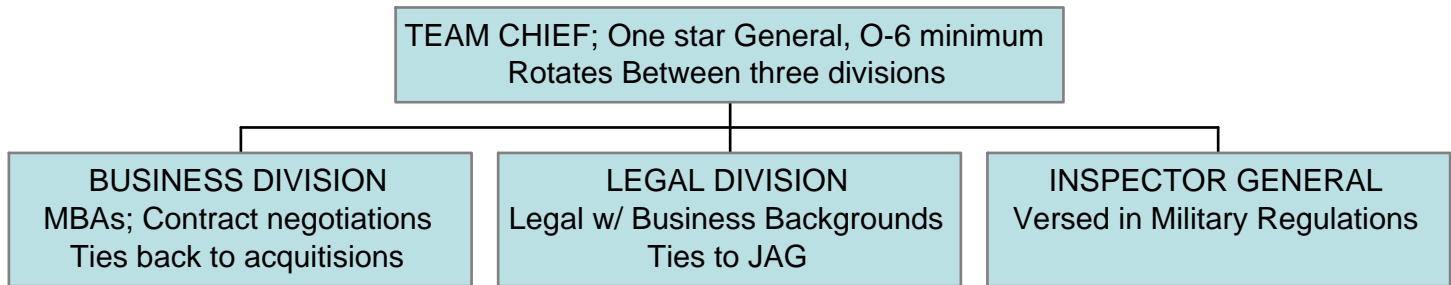
**MILITARY COMPOSITE STANDARD PAY AND REIMBURSEMENT RATES
DEPARTMENT OF THE ARMY
FOR FISCAL YEAR 2006¹**

MILITARY PAY GRADE	AVERAGE BASIC PAY	ANNUAL DOD COMPOSITE RATE²	ANNUAL RATE BILLABLE TO OTHER FEDERAL AGENCIES³
O-10	\$149,200 ⁴	\$222,600	\$223,221
O-9	145,790	221,248	221,869
O-8	131,844	208,585	209,206
O-7	116,904	185,433	186,054
O-6	98,718	181,154	181,775
O-5	79,521	150,746	151,367
O-4	67,861	133,187	133,808
O-3	53,984	108,332	108,953
O-2	40,726	83,877	84,498
O-1	29,561	64,474	65,095
WO-5	572,718	\$134,609	\$135,230
WO-4	62,627	118,008	118,629
WO-3	52,738	109,584	110,205
WO-2	42,234	91,339	91,960
WO-1	36,315	74,414	75,035
E-9	\$60,040	\$107,793	\$108,414
E-8	48,278	93,273	93,894
E-7	40,805	80,986	81,607
E-6	32,604	71,132	71,753
E-5	26,866	58,690	59,311
E-4	21,225	49,046	49,667
E-3	17,459	40,264	40,885
E-2	15,845	37,872	38,493
E-1	12,748	37,707	38,328
CADETS	\$10,072	\$19,078	Not applicable

Notes:

- 1/ Effective fiscal year 2005, military personnel services for Foreign Military Sales shall be priced using the Annual DoD Composite Rate that includes permanent change of station (PCS) expense and shall no longer use the actual PCS expense for PCS moves to support a FMS case. The next update of the DoD FMR Vol. 15 Section 070203 will reflect this change.
- 2/ The annual DoD composite rate includes the following military personnel appropriation costs: average basic pay plus retired pay accrual, Medicare-eligible retiree health care (MERHC) accrual, basic allowance for housing, basic allowance for subsistence, incentive and special pay, permanent change of station expenses, and miscellaneous pay. Includes a per capita normal cost of \$5,652 for MERHC accrual -- see Tab K-1.
- 3/ The annual rate billable to Other Federal Agencies recovers additional military related health care costs financed by the Defense Health Program. The annual billable rate includes an acceleration factor of \$6,273 for all personnel. Excludes per capita normal cost of \$5,652 for MERHC accrual -- see Tab K-1.
- 4/ To compute a Daily Rate, apply a factor of .00439. To compute an Hourly Rate, apply a factor of .00055.
- 5/ Basic pay for these officers is limited to the rate of basic pay for Level III of the Executive Schedule, which currently is \$149,200 per year.

APPENDIX FOUR



This represents only one team. The number of teams is dependent upon the extent of CBSP usage.

Multiple teams are attached to the COCOM/JFCC staff.

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About the Author

Lt Col Gary D. Smith is currently a member of the 134th Air Refueling Wing, Tennessee Air National Guard. He serves as the Standardization and Evaluation Chief. As the lead evaluator, he oversees all evaluations and training accomplished within the flying squadron. Previously he served as the Chief of Training where he developed and executed a dual conversion within the organization that became the standard for the Air National Guard. Before becoming a guardsman, he was a USAF member for nine years. He is a command pilot with over 4000 hours, mostly in one of seven Boeing C-135 aircraft variants.

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